

*United States Court of Appeals
for the
District of Columbia Circuit*



**TRANSCRIPT OF
RECORD**

JOINT APPENDIX

United States Court of Appeals

For The District of Columbia Circuit

No. 18,740

TOMMY C. ISHEE, et al.,

854

Appellants

v.

JULIA D. CONNOR, et al.,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

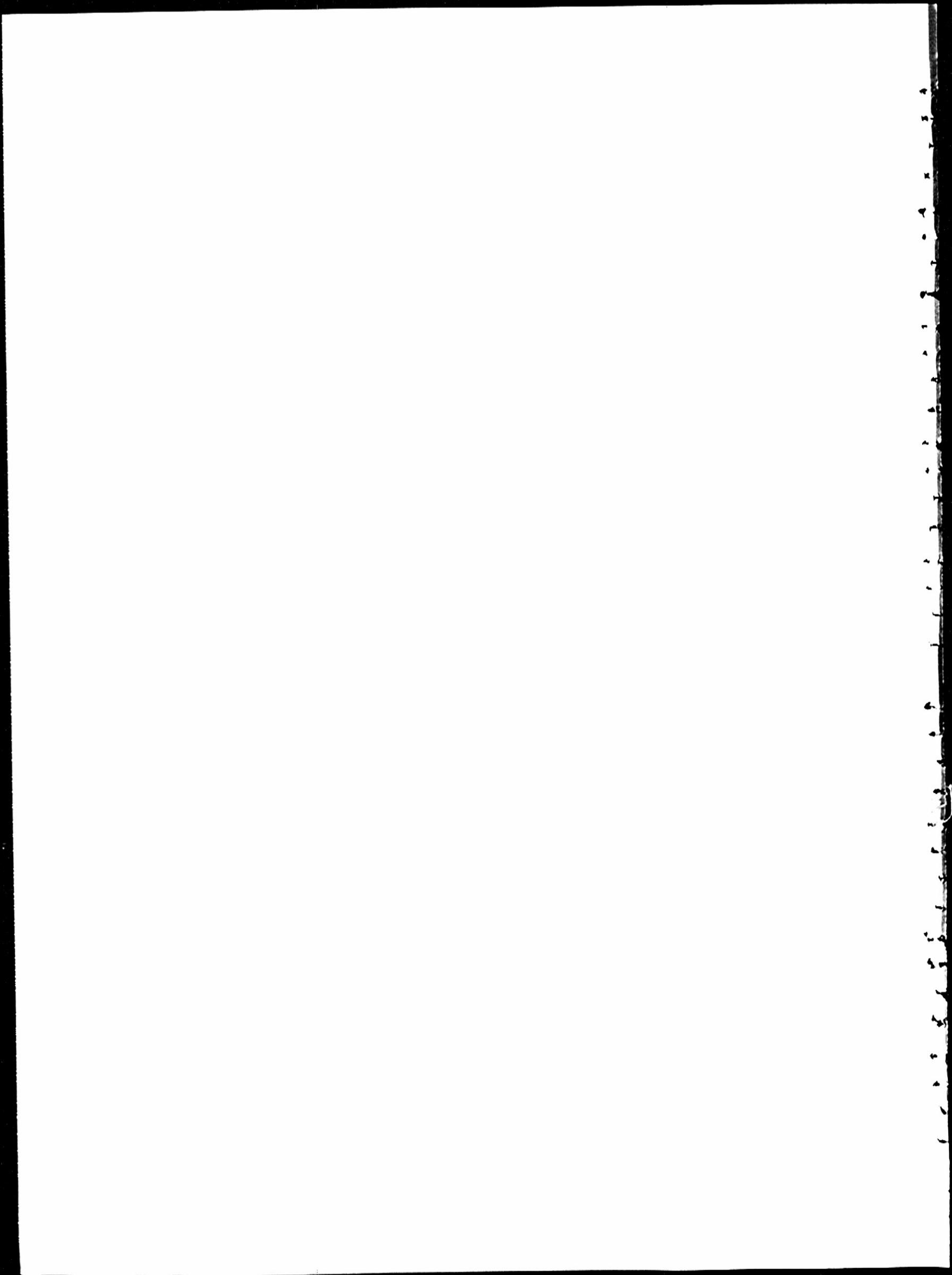
FILED NOV 10 1964

Nathan J. Paulson
CLERK

TOMMY C. ISHEE

MARYCLAIRE A. ISHEE

Appellants Pro Se



(i)

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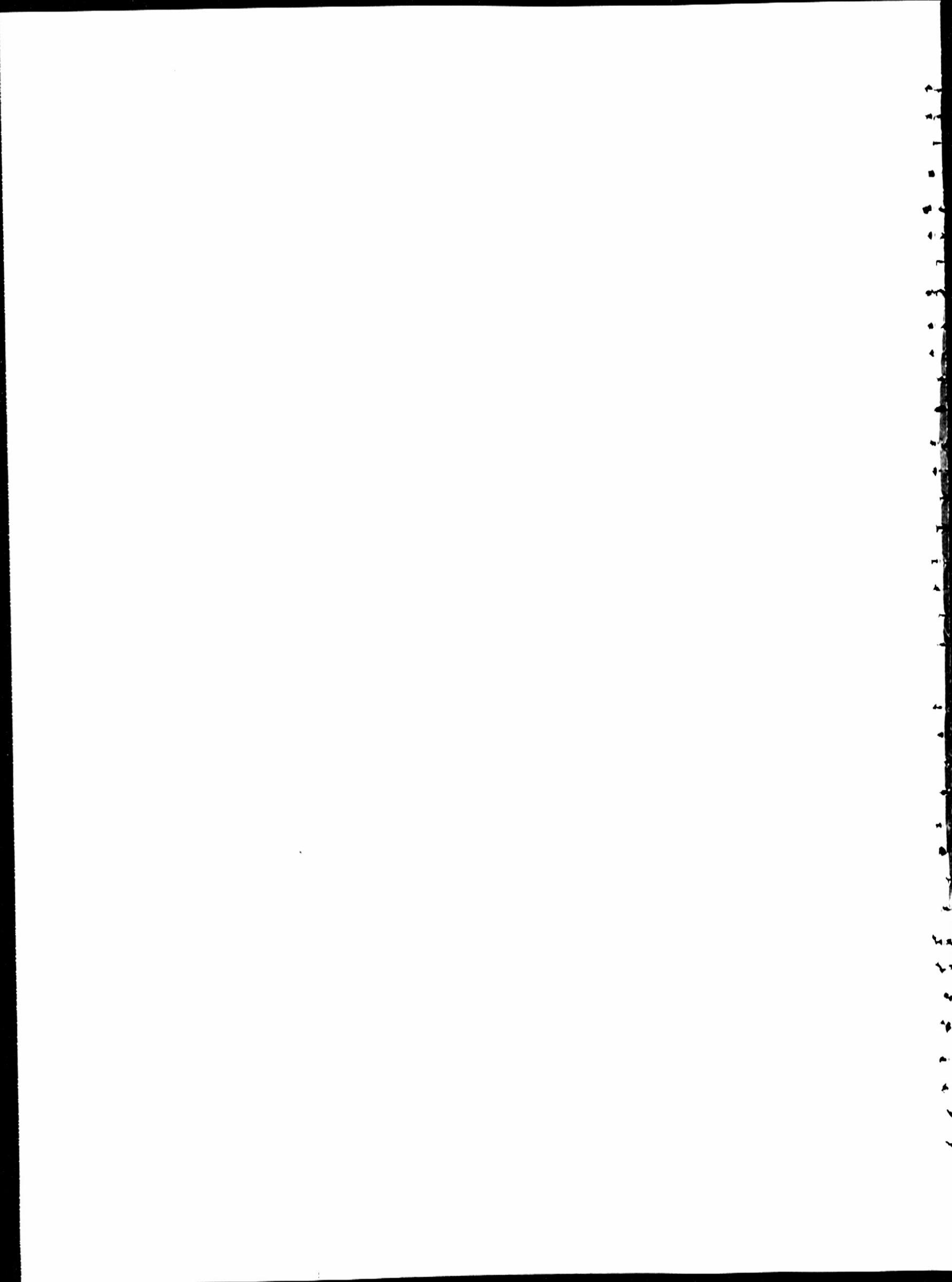
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JOINT APPENDIXUNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIA D. CONNOR, et al., :
Plaintiffs :
v. : Civil Action No. 616-63
TOMMY C. ISHEE and MARY CLAIRE ISHEE :
Defendants :

RELEVANT DOCKET ENTRIES

<u>Date</u>	<u>Proceedings</u>
1963	
Mar. 7	Summons and Complaint in Action for Injunctive Relief and to Quiet Title to Easement Obtained by Adverse Possession filed.
Apr. 6	Answer of Defendants to Complaint and Counterclaim vs. Plaintiff Gruis; Jury Demand.
Apr. 23	Answer of Plaintiff Gruis to Counterclaim.
May 20	Motion of Plaintiffs for Preliminary Injunction, supported by affidavits and exhibits. TEMPORARY RESTRAINING ORDER issued; Motion for Preliminary Injunction set for hearing 5/29/63; undertaking \$500.00. PINE, J.
May 27	Opposition of Defendants to Motion for Preliminary Injunction, with supporting affidavit of Tommy C. Ishee.
May 29-31	Affidavits of Donald Lukens, Ann F. Schreiber and Supplemental Affidavit of Edward G. Gruis filed.
June 6	Order granting Motion for Preliminary Injunction and directing that case be set for final hearing at first open date in October issued. YOUNGDAHL, J.
Oct. 3	Notice by Plaintiffs to take depositions of Mary-claire Ishee and Tommy C. Ishee filed.
Oct. 4	Case called; Certificate of Readiness filed.
Oct. 22	Pretrial proceedings.

Date1963

Nov. 5 List of witnesses filed by Plaintiffs.

Nov. 12 List of witnesses filed by Defendants.

Nov. 15 Depositions of Defendants Tommy C. Ishee and Mary-claire Ishee filed by Plaintiffs.

Dec. 2 Jury demand waived and withdrawn per Counsel. Hearing begun before MATTHEWS, J., respite to 12/2/63.

Dec. 3-4 Hearing resumed 12/3/63, respite to 12/4/63; Hearing resumed 12/4/63, respite to 12/5/63. Plaintiffs amend Complaint to include claim to easement by adverse user over Lot 849; Defendants amend answer to deny easement over Lot 849.

Dec. 5 Hearing resumed; respite to 12/6/63.

Dec. 6 Hearing resumed; case concluded and submitted; findings of fact and conclusions of law to be filed on or before 12/16/63 by both Counsel. MATTHEWS, J.

1964

Feb. 21 Memorandum directing Attorney for Plaintiffs to submit on or before 2/28/64 revised proposed findings and a proposed order, signed 2/20/64, MATTHEWS, J.

Mar. 9 Findings of Fact and Conclusions of Law; Judgment for Plaintiffs perfecting title established by adverse possession; dismissing counterclaim and granting permanent injunction against Defendants and awarding costs for all Plaintiffs against Defendants. MATTHEWS, J.

Apr. 6 Notice of Appeal by Defendants on Order 3/9/64.

Apr. 27 Motion of Defendants for Extension of Time for Filing Transcript of Testimony. GRANTED, CURRAN, J.

Apr. 27 Statement of Points on Appeal filed; Designation of Contents of Record on Appeal filed by Defendants.

May 1 Exhibits 1-14, inclusive; 16-23, inclusive; 25-46, inclusive, and 48-52 inclusive filed by Defendants; Motion of Plaintiffs to Require Defendants to File Additional Portions of Testimony to be Included in Record on Appeal and to send the original files in D.C. 884 and Equity 34055. MATTHEWS, J. Order Extending Time to File Transcript until 6/2/64 and to file Record on Appeal to and including 7/6/64, MATTHEWS, J.

June 22 Motion of Defendants to Extend Time to File Transcript to and including July 6, 1964. GRANTED, CURRAN, J.

July 2 Transcript of Proceedings filed by Defendants; Appeal Docketed.

(Filed March 7, 1963)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIA D. CONNOR, et al., :
Plaintiffs,
v. : Civil Action No. 616-63
TOMMY C. ISHEE, et al., :
Defendants

COMPLAINT FOR INJUNCTIVE RELIEF AND TO
QUIET TITLE TO AN EASEMENT OBTAINED BY
ADVERSE POSSESSION

1. Plaintiffs and defendants are all citizens of the United States and residents of the District of Columbia, of adult age, under no legal disability. The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars (\$10,000.00)

2. Jurisdiction is founded on Title II, Section 11-306, and Title 16, Section 1501, of the District of Columbia Code (1961 edition).

3. Plaintiffs, Julia D. and Mary Connor, are owners in fee simple of Lots 66 and 65 in Square 734, improved by homes numbered 170 and 172 North Carolina Avenue, S.E., Washington, D.C.

4. Plaintiff, Dorothy Breuninger Grigsby, is owner in fee simple of part of Original Lot 2, known for purposes of assessment and taxation as Lot 800 in Square 734, improved by a home numbered 160 North Carolina Avenue, S.E., Washington, D.C.

5. Plaintiff, Maurine T. Horton, is owner in fee simple of Lot B in Square 734, improved by premises 176 North Carolina Avenue, S.E., Washington, D.C.

6. Plaintiff, Ann F. Schreiber, is owner in fee simple of Lot 64 in Square 734, improved by a home numbered 174 North Carolina Avenue, S.E., Washington, D.C.

7. Plaintiff, Edward G. Gruis, is owner in fee simple of Lot 46 in Square 734, improved by an apartment building 409-411 Second Street, S.E., Washington, D.C.

8. Defendants are owners in fee simple of the east 48.17 feet front on D Street by the full depth of Original Lot 18 in Square 734, known for purposes of assessment and taxation as Lot 848 in Square 734.

9. A predecessor in title to defendants' subject land, Daniel Allman, Sr., acquired title to the east 46 feet from front to rear of Lot 2 in Square 734 (now being Lots 64, 65 and 66, now owned by plaintiffs, Ann F. Schreiber, Julia D. Connor and Mary Connor and now improved by premises 174, 172 and 170 North Carolina Avenue, S.E., Washington, D.C. by deed dated March 20, 1860, and recorded June 12, 1862 as Instrument No. 73419 in Liber JAS 220 at old folio 201, new folio 140, among the land records of the District of Columbia, and thereafter resided upon said Lot 66 in premises 170 North Carolina Avenue, S.E. Said Daniel Allman, Sr. acquired title to defendants' land by deed dated August 9, 1899 and recorded on August 11, 1899 in Liber 2407 at folio 233, among the land records of the District of Columbia. Equity Case No. 34055, in this Court, then known as the Supreme Court of the District of Columbia, discloses that Daniel Allman, Sr. at the time of his death on September 19, 1915, owned the land of defendants and the land of plaintiffs known as Lots 64, 65, 66 and B in Square 734. This Court in that proceeding entered a decree dated May 31, 1916 partitioning the said land of plaintiffs and the land now owned by defendants, which decree provided for conveyance of said land of plaintiffs to the heirs of Daniel Allman, Sr. and the sale by trustees of the land now owned by defendants. Said trustees appointed by said decree of this Court, sold the land now owned by defendants to Marie Duff and conveyed title to the purchaser by deed dated January 9, 1919 and recorded on January 10, 1919 as Instrument No. 66 in Liber 4116 at folio 447 among the land records of the District of Columbia, which deed created a right of way over the rear 12 feet of defendants' subject pro-

perty for the benefit of Original Lot 2 and sub Lot B in Square 734 (now said Lots 64, 65, 66 and B and 800 in Square 734). Each subsequent conveyance of defendants' subject property was made subject to the subject right of way over the rear 12 feet of defendants' subject property, namely,

Conveyance from said Marie Duff to D. R. Romines by deed dated August 9, 1922 and recorded August 16, 1922 as Instrument No. 198 among the land records of the District of Columbia.

Conveyance from D. R. Romines to Bessie K. Brown, by deed dated August 15, 1922 and recorded on August 16, 1922 as Instrument No. 199 among the land records of the District of Columbia.

Conveyance from Bessie K. Brown to Lee Walsky by deed dated December 19, 1923 and recorded on December 24, 1923 as Instrument No. 74 among the land records of the District of Columbia.

Conveyance from Lee Walsky to John D. Neuman et ux. by deed dated June 19, 1945 and recorded on June 26, 1945 as Instrument No. 21397 among the land records of the District of Columbia.

Conveyance from John D. Neuman et ux. by deed dated August 3, 1945 and recorded on August 7, 1945 among the land records of the District of Columbia.

Conveyance from May Meaders et ux. to defendants Tommie C. and Maryclaire Ishee by deed dated November 30, 1951 and recorded on December 10, 1951 as Instrument No. 51674 in Liber 9810 at folio 674 among the land records of the District of Columbia, all subject to the aforesaid right of way over the rear 12 feet of defendants' subject property for the benefit of original Lot 2 and sub Lot B in Square 734 (now Lots 64, 65, 66, B and 800 in Square 734).

Defendants have additionally had personal knowledge of and have acknowledged the existence of the subject right of way as evidenced by conveyances to trustees of defendants' subject property to secure indebtedness of defendants by deed of trust executed by defendants dated November 30, 1951 and recorded on December 10, 1951 as Instrument No. 51675 among the Land Records of the District of Columbia and by deed of trust executed by defendants dated May 1, 1956 and recorded on May 1, 1956 as Instrument No. 14717 among the Land Records of the District of Columbia. Since January 9, 1919 the subject right of way over the rear 12

12 feet of defendants' subject property has been continuously used for general alley purposes for the use and benefit of the ownership of said Lots 64, 65, 66, B and 800 in Square 734, excepting to the extent that such use has been unlawfully impeded, obstructed, and otherwise interfered with by defendants' actions commencing in or about August 1962.

10. On or about July 25, 1924, and continuously, openly and notoriously thereafter, said right of way created by said deed for the benefit of said Lots 64, 65, 66, 800 and B in Square 734 has been additionally used as a right of way for the benefit of said Lot 46 in Square 734, owned by plaintiff Edward G. Gruis, namely, for ingress and egress for fuel deliveries, trash and garbage removal, as a rear service entrance and for rear tenant access serving the apartment house located thereon, all of which use was continuously adverse and hostile to the ownership of said Lot 848 in Square 734 owned now by defendants; and, upon the expiration of 15 years of such adverse use, title to an easement for such use was conferred upon the ownership of said Lot 46 as the dominant estate, said Lot 848 in Square 734 thereby becoming the servient estate.

11. Commencing in or about August 1962, defendants have wilfully, unlawfully, and in violation of the rights of plaintiffs hereinabove referred to, erected or caused to be erected, certain barricades consisting of wooden posts and fencing, and have parked cars which have impeded, obstructed, and otherwise interfered with the lawful use by plaintiffs of the subject right of way.

12. Notwithstanding plaintiffs' patient and conciliatory efforts to consummate an amicable removal of the aforesaid unlawful posts, fencing and defendants' parked automobiles, defendants have failed and refused to do so and have disregarded an ultimate demand that they do so.

13. Plaintiffs, as owners of their respective properties, have been damaged by defendants' unlawful action described in paragraph 12 hereof, and will be irreparably injured unless and

until the condition of the subject right of way is restored to the condition in which it existed for many decades prior to August 1962, by reason of the fact that no alternate rear access to plaintiffs' properties for the subject purposes is available or obtainable.

WHEREFORE, plaintiffs pray:

1. That a mandatory injunction issue against defendants, preliminarily and permanently, requiring them to restore the right of way to its former condition by removing parked cars, posts and fencing and to refrain from impeding, obstructing or otherwise interfering with the use of the subject right of way.
2. That plaintiffs be awarded damages for the period up to date of restoration by defendants to its former condition in the sum of Three Thousand Dollars (\$3,000.00) as to each house on Lots 64, 65, 66, 800 and B and in the sum of Ten Thousand Dollars (\$10,000.00) respecting the apartment house located upon Lot 46 in Square 734, for a total of Twenty-Five Thousand Dollars (\$25,000.00) plus reasonable counsel fees and costs of this proceeding.
3. That plaintiffs be awarded such other and further relief as the Court may deem meet and proper.

WILKES & ARTIS

By /s/ James C. Wilkes, Jr.
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIA D. CONNOR, et al., :
Plaintiffs :
v. : Civil Action No. 616-63
TOMMY C. ISHEE, et al., :
Defendants :

ANSWER AND COUNTERCLAIM

First Defense: Plaintiffs' complaint does not state a cause of action upon which relief may be granted.

Second Defense: Defendants admit the allegations of paragraphs 1, 2, 4, 5, 6, 7 and 8 of the complaint; admit so much of paragraph 3 as pertains to the ownership of Lot 65 and state they are without sufficient knowledge as to admit or deny the other allegations therein; admit so much of paragraph 9 as pertains to the chain of title and the establishment of a right of way over the rear 12 feet of defendants' Lot 848 in Square 734 for the benefit of Lots 64, 65, 66, 800 and B in said square and deny all other allegations therein.

Third Defense: Defendants deny the allegations of paragraph 10 of the complaint.

Fourth Defense: Defendants deny the allegations of paragraph 11 of the complaint.

Fifth Defense: Defendants deny the allegations of paragraphs 12 and 13 of the complaint.

Sixth Defense: Defendants have placed gates along and across certain portions of said right of way, the placing of said gates having been necessitated by the unauthorized use and abuse of said right of way continually by certain of the plaintiffs herein, the tenants of certain of the plaintiffs herein, and others, thereby creating a continuing hazard to the health, safety and well-being of defendants and their minor children.

Seventh Defense: Plaintiff, Edward G. Gruis, is barred by laches from the prosecution of the above entitled cause.

COUNTERCLAIM

1. Lot 848 in Square 734, owned by defendants and counterclaimants, Tommy C. Ishee and Mary Claire Ishee, is, along the rear part of its eastern line, contiguous to the western or rear line of Lot 46 in said square, improved by an apartment building, 409-411 Second Street, S.E., and owned by plaintiff and counter-defendant, Edward G. Gruis. The said lots were separated and fenced off from each other by a high wooden fence until sometime during the month of March 1963, said fence having a door in it opening onto the rear portion of said Lot 848 from said Lot 46, and being on said Lot 848 in its entirety.

2. Sometime during the year of 1961, plaintiff and counter-defendant, Edward G. Gruis, his agents and servants, entered upon the said Lot 848 and opened and removed said door, thereby opening the rear of said Lot 848 to use by unauthorized persons to the damage of defendants and counterclaimants; and sometime during the month of March 1963, plaintiff and counterdefendant, Edward G. Gruis, his agents and servants, entered upon the said Lot 848 and once again, without the knowledge or consent of defendants and counterclaimants, tore down and removed said fence, thereby rendering the rear of said Lot 848 unfit for use by the minor children of defendants and counterclaimants, all to the damage of defendants and counterclaimants, in the amount of \$20,000.00

3. Plaintiff and counterdefendant, Edward G. Gruis, wilfully failed and refused for a period of more than two years until sometime during the month of March 1963, to remove from the rear of said Lot 46, despite repeated notices given to him by defendants and counterclaimants, a tree which overhung said Lot 848 in such a manner and to such a degree as to cause serious damage to the house of defendants and counterclaimants on said Lot 848 in the amount of \$5,000.00.

WHEREFORE, defendants and counterclaimants pray:

1. That plaintiffs' action be dismissed with costs.
2. That judgment be granted against plaintiff and counter-defendant, Edward G. Gruis, in the full sum of \$25,000 with costs.

3. and for such other and further relief as to the Court may seem just and proper.

/s/ Arthur M. Wagman
Attorney for Defendants and Counterclaimants

DEMAND FOR JURY TRIAL

Defendants and counterclaimants demand trial by jury on all issues of the counterclaim so triable.

/s/ Arthur M. Wagman
Attorney for Defendants and Counterclaimants

(Filed April 23, 1963)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIA D. CONNOR, et al., Plaintiffs	:	
vs.	:	Civil Action No. 616-63
TOMMY C. ISHEE, et al., Defendants	:	

ANSWER OF PLAINTIFF EDWARD G. GRUIS TO
COUNTERCLAIM OF PLAINTIFFS

Comes now the plaintiff, Edward G. Gruis, by his counsel, and in answer to the Counter-Claim of defendants, Tommy C. Ishee and Maryclaire Ishee, states as follows:

First Defense

The Counter-Claim fails to state a claim upon which relief can be granted.

Second Defense

1. Plaintiff admits the allegations set forth in the first sentence of paragraph 1 of the Counter-Claim. Plaintiff denies the existence of a fence being on defendants' Lot 848 in Square 734 in its entirety, but admits the existence of a fence constructed by plaintiff's predecessor in title on or within the rear or west property line of plaintiff's Lot 46, with respect to which plaintiff and plaintiff's predecessors in title have exercised exclusive control, in which fence since on about July 25, 1924 and continuously thereafter, an opening has existed in said fence as access for the use of

The subject right-of-way, as set forth in paragraph 10 of the Complaint, which fence had a door upon the property of plaintiff and over which plaintiff and plaintiff's predecessors in title exercised exclusive control, to the exclusion of any control whatsoever by defendant's predecessors in title, which door was removed from the fence at the direction of plaintiff, as a matter of right, and without entering upon defendants' property for the purpose of removing said door or gate.

Plaintiff denies all other allegations set forth in paragraph 1 of the Counter-Claim.

2. Plaintiff admits that during the year 1961 plaintiff caused the subject gate in the fence owned by plaintiff to be removed, denies any unlawful entry upon defendants' Lot 848 in connection with said removal, asserts that the removal of plaintiff's gate by plaintiff was done as a matter of right, denies that the removal of said gate opened the rear of said Lot 848 of the defendants to use by unauthorized persons, admits that he caused his fence to be torn down and removed, asserts that the removal of said fence rendered the rear of defendants' Lot 848 unfit for use by the minor children of defendants, and denies that defendants were in any respect damaged by his actions.

3. Plaintiff admits the existence of a tree which was rooted in part upon plaintiff's Lot 46, admits that certain branches of said tree overhung said Lot 848 of defendants, admits that defendants demanded that said tree be removed by plaintiff from the rear of plaintiff's property, denies that plaintiff was obligated to remove said tree, denies any damages by said tree to the property of defendants, and further states that he advised defendants that defendants were at liberty to remove all or part of said tree which over-hung defendants' property, but that defendants elected not to do so, and further states that when plaintiff at a later date elected to remove said tree, defendants attempted

to preclude him from doing so.

WHEREFORE, plaintiff prays:

1. That defendants' Counter-Claim be dismissed with costs in favor of plaintiff.

2. For such and further relief as to the Court may appear proper.

WILKES & ARTIS

By /s/ James C. Wilkes, Jr.
Attorneys for Plaintiff
Edward G. Gruis

(Filed May 20, 1963)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIA D. CONNOR, et al.
Plaintiffs

v. : Civil Action No. 616-63

TOMMY C. ISHEE, et al.
Defendants

MOTION OF PLAINTIFFS FOR PRELIMINARY INJUNCTION

Plaintiffs move this Court that the Defendants be enjoined pending the final hearing of this action from erecting or maintaining or interfering with the removal by plaintiffs or plaintiffs' agents, of posts, fences or fencing which in any manner obstructs or impedes access over the rear 12 feet of defendants' Lot 848 in Square 734 to the rear of defendants' premises 149 D Street, S.E., Washington, D.C. for general alley purposes for the use and benefit of the ownership of Lots 64, 65, 66, B and 800 in Square 734 owned by plaintiffs Julia D. Connor, Mary Connor,

Dorothy Breuninger Grigsby, Maurine T. Horton, Ann F. Schreiber, improved by premises 160, 170, 172, 174 and 176 North Carolina Avenue, S.E., Washington, D.C. and for ingress and egress for fuel deliveries, trash and garbage removal and as a rear service entrance and for rear tenant access serving the apartment house located upon Lot 46 in Square 734 owned by plaintiff Edward G. Gruis and improved by premises 409-411 Second Street, S.E., Washington, D.C.; and further enjoined from planting or maintaining shrubs, plants, trees or flowers in the subject right of way area; and further enjoined from doing any other act which would in any manner interfere with the enjoyment, use of the subject right of way area on the grounds set forth in Affidavits in support of this Motion, on the ground that if defendants' actions are permitted to continue, plaintiffs will suffer irreparable damage, a money judgment being an inadequate substitute for the wrongful elimination of the use of an easement which serves as the sole access for general alley purposes to the rear of six properties having accommodations for 21 families.

WILKES & ARTIS

By /s/ James C. Wilkes,
Jr.

(Filed May 20, 1963)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIA D. CONNOR, et al., :
Plaintiffs :
vs. : Civil Action No. 616-63
TOMMY C. ISHEE, et al., :
Defendants :

POINTS AND AUTHORITIES IN SUPPORT OF MOTION
OF PLAINTIFFS FOR PRELIMINARY INJUNCTION

1. Rule 65 of the Federal Rules of Civil Procedure.

2. When a motion for preliminary injunction is presented to a court in advance of hearing on the merits, it is called upon to exercise its discretion upon the basis of a series of estimates: (1) the relative importance of the rights asserted and the acts sought to be enjoined; the irreparable nature of the injury allegedly flowing from denial of preliminary relief; (3) the probability of ultimate success or failure of the suit; (4) the balancing of damages and convenience generally. Perry v. Perry, 88 U.S. App. D.C. 337, 338.

3. The probability is that the suit will succeed.

Defendants by their answer to the complaint have admitted

" . . . the establishment of a right of way over the rear 12 feet of defendants' Lot 848 in Square 734 for the benefit of Lots 64, 65, 66, 800 and B in said Square . . . "

Defendants have offered no sworn statement which contradicts the affidavit of Julia D. Connor that since before January 1, 1919, to her personal knowledge, subject right of way over the rear 12 feet of defendants' Lot 848 in Square has been continuously used for general alley purposes for the

ownership of Lots 64, 65, 66, B and 800 in Square 734, excepting to the extent that such use has been unlawfully impeded, obstructed and otherwise interfered with by defendants' action and that since before July 25, 1924 said right of way over the rear 12 feet of defendants' property, to her personal knowledge, has been additionally used as a right of way for the benefit of the apartment house located on Lot 46 in Square 734, now owned by plaintiff, Edward G. Gruis, namely for ingress and egress for fuel deliveries, trash and garbage, as a service entrance and for rear tenant access serving said apartment house.

4. Relative importance of the rights asserted and the acts sought to be enjoined. Defendants claim the right to cease a use of realty which has continued since January 9, 1919 respecting Lots 64, 65, 66, B and 800 and since July 25, 1924 respecting Lot 46 in Square 734. Defendants' rights affect one family. Plaintiffs' rights affect twenty-one families.

5. Irreparable injury to plaintiffs would flow from a denial of a preliminary injunction. A money judgment would be an inadequate remedy to compensate plaintiffs for wrongful deprivation of the sole means of alley access to their respective properties.

6. Withholding an injunction would cause more damage to plaintiffs than granting an injunction would cause defendants, Electric Welding Alloys Corp. v. Zeisel et al., 11 Federal Rules Decision 78. An injunction will not result in the elimination of alley access to defendants' property. An injunction is necessary to assure continued alley access to plaintiffs' properties.

7. Conclusion. On the basis of the foregoing, plaintiffs respectfully urge that the motion for preliminary injunction be granted.

WILKES & ARTIS

By /s/ James C. Wilkes, Jr.

(Exhibits filed with Plaintiffs' Motion for Preliminary Injunction were reintroduced at the trial of the case and are included in the Joint Appendix as Plaintiffs' Exhibit No. 24).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIA D. CONNOR, et al., :
Plaintiffs :
vs. : Civil Action No. 616-63
TOMMY C. ISHEE, et al., :
Defendants :

AFFIDAVIT OF JULIA D. CONNOR

DISTRICT OF COLUMBIA, ss:

Julia D. Connor, being first duly sworn, on oath deposes as follows:

1. That she is one of the owners in fee simple of Lots 66 and 65 in Square 734, improved by homes numbered 170 and 172 North Carolina Avenue, S.E., Washington, D.C.;

2. Since before January 9, 1919, to my personal knowledge, subject right of way over the rear twelve feet of defendants' Lot 848 in Square 734 has been continuously used for general alley purposes for the use and benefit of the ownership of Lots 64, 65, 66, B and 800 in Square 734, excepting to the extent that such use has been unlawfully impeded, obstructed and otherwise interfered with by defendants' actions;

3. Since before July 25, 1924, said right of way over the rear twelve feet of defendants' property, to my personal knowledge, has been additionally used as a right of way for the benefit of the apartment house located on Lot 46, in Square 734, now owned by plaintiff Edward G. Gruis, namely for ingress and egress for fuel deliveries, trash and garbage, as a service entrance and for rear tenant access serving said apartment house;

4. Posts, fences and fencing caused to be erected by defendants now obstruct access by automobiles to the garages located at the rear of two houses owned by me located upon said Lots 66 and 65 in Square 734, 170 and 172 North Carolina Avenue, N.W., Washington, D.C.;

5. Premises 172 North Carolina Avenue, S.E. are under lease by me to Donald Lukens, who has notified me that he is unable to obtain access to the garage which is part of the leased premises by reason of the posts, fences and fencing, and that he has therefore

been required to park with great difficulty upon the public streets and as a result thereof, has had the tires from his car stolen twice;

6. By reason of the erection of said obstructions by defendants, I am now in default under covenant to provide access to the aforesaid garage, which is a part of the leased premises at 172 North Carolina Avenue, S.E.;

7. Additionally, defendants have frequently parked auto vehicles within the subject right of way during the pendency of this suit.

/s/ Julia D. Connor

I, Julia D. Connor, have read the foregoing affidavit, by me subscribed, and the facts therein stated are true to my personal knowledge.

/s/ Julia D. Connor

SUBSCRIBED AND SWORN TO before me this 18 day of May, 1963.

/s/ Mary F. Vincent
Notary Public, D.C.

My commission expires
September 30, 1963

(Filed May 20, 1963)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIA D. CONNOR, et al.	:	
Plaintiffs	:	
vs.	:	Civil Action No. 616-63
TOMMY C. ISHEE, et al.	:	
Defendants	:	

AFFIDAVIT OF EDWARD G. GRUIS

DISTRICT OF COLUMBIA, ss:-

Edward G. Gruis, being first duly sworn, on oath deposes as follows:

1. That he is the owner in fee simple of Lot 46 in Square 734 improved by an apartment building at 409-411 Second Street, S.E.;
2. That said apartment building contains sixteen apartment units, has recently been completely renovated and remodeled at a

cost in excess of \$70,000.00, and has a gross rent roll of approximately \$1000.00 per month;

3. That said apartment building is landlocked and is dependent upon a right of way established over the rear twelve feet of property owned by defendants, known as Lot 848 in Square 734, improved by premises 149 D Street, S.E., for ingress and egress for fuel deliveries and trash and garbage removal;

4. The fuel oil supply line to the fuel oil storage tank is located at the rear of my property, and, unless access thereto across the subject right of way is made possible by the removal of fences caused to be erected by defendants on or about May 16, 1963, fuel oil will be unavailable for heating hot water which serves the sixteen apartment units, and I will be in violation of covenants under existing leases to furnish hot water to the tenants in the apartment building;

5. The accumulation of trash and garbage will cause an impossible situation from the standpoint of appearance and moreover, will create a health hazard;

6. Defendants have frequently parked motor vehicles in the subject right of way area which has obstructed ingress and egress to the subject apartment building across the right of way;

7. Defendants have recently planted shrubs in the subject right of way over the rear twelve feet of defendants' subject property;

8. Defendants have failed and refused to remove posts, fencing and fences which unlawfully obstruct the subject right of way.

/s/ Edward G. Gruis

DISTRICT OF COLUMBIA, ss:

I, Edward G. Gruis, being first duly sworn, on oath say that I have read the foregoing affidavit, by me subscribed, and the facts therein stated are true to my personal knowledge.

/s/ Edward G. Gruis

SUBSCRIBED AND SWORN TO BEFORE ME, a notary public, this 18th day of May, 1963.

/s/ Alma B. Newell
Notary Public, D.C.
My Commission expires
March 14, 1965

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIA D. CONNOR, et al.	:	
Plaintiffs	:	
v.	:	Civil Action No. 616-63
TOMMY C. ISHEE and MARY CLAIRE ISHEE	:	
Defendants	:	

TEMPORARY RESTRAINING ORDER

This action came on to be heard upon motion of plaintiffs for a temporary restraining order against the defendants, after notice of hearing by plaintiffs, served upon counsel for the defendants by delivering a copy thereof to his office on May 18, 1963, and it appearing to the Court from the affidavits attached to plaintiffs' motion that the defendants have caused to be erected on or about May 16, 1963, a fence across the gate at the rear of Lot 46, improved by premises 409-411 Second Street, S.E., owned by plaintiff Edward G. Gruis, thereby precluding access to the subject right of way from the property of plaintiff Edward G. Gruis; that defendants have frequently parked motor vehicles in the subject right of way; that the failure and refusal of defendants to cause the removal of certain posts, fences and fencing has precluded access to the garage facilities of other plaintiffs over the right of way, the establishment of which has been admitted by defendants in their answer to the complaint; and that unless defendants are temporarily restrained from interfering with the removal of said post, fences and fencing which obstruct access over the subject right of way by the plaintiffs and further restrained from the parking of motor vehicles within the subject right of way area, the plaintiffs will suffer irreparable injury, it is, by the Court, this 20th day of May, 1963:

ORDERED That the defendants Tommy C. Ishee and Maryclaire Ishee, and their agents, servants, employees and attorneys and those persons in active participation with them who receive actual notice of this order by personal service or otherwise, are hereby restrained and enjoined from interfering with the removal by plaintiffs or plaintiffs' agents of the posts, fences and fencing which obstruct access over the subject right of way, and are hereby further re-

strained from doing any act which would in any manner interfere with the use of the subject right of way over the rear 12 feet of defendants' property for general alley purposes; provided, that the plaintiffs or any one of them, shall forthwith give bond, with approved surety, in the penal sum of Five hundred Dollars (\$500.00) conditioned upon the payment of such costs or damages as may be incurred or suffered by any parties who are found to be wrongfully restrained or enjoined thereby; and it is

FURTHER ORDERED, That plaintiffs' motion for preliminary injunction is hereby set for hearing at 10 A.M. on the 29th day of May, 1963; and this temporary restraining order shall expire at 10 A.M. on the 29th day of May, 1963.

/s/ David A. Pine
Judge

Issued on the 20th day of May, 1963
at 2:30 p.m.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIA D. CONNOR, et al.	:	
Plaintiffs	:	
vs.	:	Civil Action No. 616-63
TOMMY C. ISHEE, et al.	:	
Defendants	:	

OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

Defendants oppose the motion for preliminary injunction brought by the plaintiffs herein and as reasons therefor, state as follows:

1. The use of the 12-foot right-of-way, granted by deed, by plaintiffs, Julia D. Connor, Mary Connor, Dorothy Breuninger Grigsby Maurine T. Horton, and Anne F. Schreiber, as owners of Lots 64, 65, 66, B and 800 in Square 734, was not obstructed or impeded by the three late posts and gates which were erected by defendants in August 1962 because of the failure and refusal of said plaintiff's to maintain said right of way free of debris, refuse, trash and other impediments placed on said right of way by said plaintiffs and/or their

their tenants; because said right of way was open and uninclosed at its west end and was being used by unauthorized users; that defendants are the parents of ten children, six of which are under 10 years of age and require as a play area that portion of Lot 848, owned by defendants who reside in the premises, 149 D Street, S.E., which is to the rear of said premises; and that the continued abuse of said easement by said plaintiffs and by unauthorized users constituted a hazard and danger to the health and welfare of defendants' minor children and deprived defendants of the use and enjoyment of their real property.

2. The said gates and posts and their continued existence could not cause irreparable harm to said plaintiffs because two of said plaintiffs, Maurine T. Horton and Anne F. Schreiber, owners of Lots B and 800 in said square, improved by premises 174 and 176 North Carolina Avenue, S.E., have no garages or other doors opening onto said right of way; that plaintiff, Dorothy Breuninger Grigsby, owner of Lot 66, improved by premises 160 North Carolina Avenue, S.E., has suffered and could not suffer any harm or injury whatsoever because said gates and posts were to the east of said Lot 66, leaving the rear of said lot and the garage thereon fully open; and that lots 64 and 65 in said square, improved by premises 170 and 172 North Carolina Avenue, S.E. which have garages on the rear of said lots opening onto said right of way were not obstructed or impeded by said gates because said gates could be opened fully to permit access of an automobile thereto and that prior to the temporary restraining order granted herein by this court on May 20, 1963, said garages could not be used for parking because the doors to said garages were and have been for some years in such dilapidated condition that they could not be opened readily or used in the manner in which garage doors are meant to be used; and that further, said gates were not and could not be bolted, only latched, from either side, and opened fully so as to permit ingress and egress along said right of way.

3. Plaintiff, Edward G. Gruis, as owner of Lot 46 in Square 734, improved by premises 409-411 Second Street, S.E., will suffer no irreparable harm or injury by the continued existence of said gates and posts along said right of way; that ingress and egress

to said Lot 46 and the apartment house thereon for the purposes of fuel deliveries, trash removal and other purposes are available through the front and side of said lot and apartment house thereof; that the use of said right of way by plaintiff, Edward G. Gruis, and/or his agents, employees and tenants, is a permissive use and not an easement by prescription and that said plaintiff was given written notice to this effect by defendants prior to his purchase of said lot and apartment house.

4. Plaintiff, Edward G. Gruis, by his acts, in the event an easement by prescription did exist, voided said easement by trespassing upon the land of defendants and tearing down, without permission or consent of defendants first obtained, the fence which stood on the land of defendants and ran parallel to the rear line of said lot 46 for the full width of said 12 foot right of way to the north line of said lot 46; that said fence had been in existence prior to 1924, the year in which plaintiff, Edward G. Gruis, claimed the said easement by prescription began to run, and that its removal by said plaintiff constituted an enlargement of use.

5. Defendants were within their rights to obstruct on their land, the east end of said easement and right of way, the gate opening thereon from the lot 46 through a new fence erected on said lot 46 at its rear line in the past two months because the use of said right of way by plaintiff was permissive; because the open gate constituted a dangerous and attractive nuisance to the minor children of defendants who from time to time in the recent past have run from their yard onto said lot 46 to climb the open stairway at the rear of said apartment house, four stories high.

6. And for such other reasons as will be presented at the hearing of said motion.

/s/ Arthur M. Wagman
Attorney for Defendants

(Exhibits filed with Defendants' Opposition to Motion for Preliminary Injunction were reintroduced at the trial of the case and are included in the Joint Appendix as Defendants' Exhibits Nos. 11, 12, and 20)

their tenants; because said right of way was open and uninclosed at its west end and was being used by unauthorized users; that defendants are the parents of ten children, six of which are under 10 years of age and require as a play area that portion of Lot 848, owned by defendants who reside in the premises, 149 D Street, S.E., which is to the rear of said premises; and that the continued abuse of said easement by said plaintiffs and by unauthorized users constituted a hazard and danger to the health and welfare of defendants' minor children and deprived defendants of the use and enjoyment of their real property.

2. The said gates and posts and their continued existence could not cause irreparable harm to said plaintiffs because two of said plaintiffs, Maurine T. Horton and Anne F. Schreiber, owners of Lots B and 800 in said square, improved by premises 174 and 176 North Carolina Avenue, S.E., have no garages or other doors opening onto said right of way; that plaintiff, Dorothy Breuninger Grigsby, owner of Lot 66, improved by premises 160 North Carolina Avenue, S.E., has suffered and could not suffer any harm or injury whatsoever because said gates and posts were to the east of said Lot 66, leaving the rear of said lot and the garage thereon fully open; and that lots 64 and 65 in said square, improved by premises 170 and 172 North Carolina Avenue, S.E. which have garages on the rear of said lots opening onto said right of way were not obstructed or impeded by said gates because said gates could be opened fully to permit access of an automobile thereto and that prior to the temporary restraining order granted herein by this court on May 20, 1963, said garages could not be used for parking because the doors to said garages were and have been for some years in such dilapidated condition that they could not be opened readily or used in the manner in which garage doors are meant to be used; and that further, said gates were not and could not be bolted, only latched, from either side, and opened fully so as to permit ingress and egress along said right of way.

3. Plaintiff, Edward G. Gruis, as owner of Lot 46 in Square 734, improved by premises 409-411 Second Street, S.E., will suffer no irreparable harm or injury by the continued existence of said gates and posts along said right of way; that ingress and egress

to said Lot 46 and the apartment house thereon for the purposes of fuel deliveries, trash removal and other purposes are available through the front and side of said lot and apartment house thereof; that the use of said right of way by plaintiff, Edward G. Gruis, and/or his agents, employees and tenants, is a permissive use and not an easement by prescription and that said plaintiff was given written notice to this effect by defendants prior to his purchase of said lot and apartment house.

4. Plaintiff, Edward G. Gruis, by his acts, in the event an easement by prescription did exist, voided said easement by trespassing upon the land of defendants and tearing down, without permission or consent of defendants first obtained, the fence which stood on the land of defendants and ran parallel to the rear line of said lot 46 for the full width of said 12 foot right of way to the north line of said lot 46; that said fence had been in existence prior to 1924, the year in which plaintiff, Edward G. Gruis, claimed the said easement by prescription began to run, and that its removal by said plaintiff constituted an enlargement of use.

5. Defendants were within their rights to obstruct on their land, the east end of said easement and right of way, the gate opening thereon from the lot 46 through a new fence erected on said lot 46 at its rear line in the past two months because the use of said right of way by plaintiff was permissive; because the open gate constituted a dangerous and attractive nuisance to the minor children of defendants who from time to time in the recent past have run from their yard onto said lot 46 to climb the open stairway at the rear of said apartment house, four stories high.

6. And for such other reasons as will be presented at the hearing of said motion.

/s/ Arthur M. Wagman
Attorney for Defendants

(Exhibits filed with Defendants' Opposition to Motion for Preliminary Injunction were reintroduced at the trial of the case and are included in the Joint Appendix as Defendants' Exhibits Nos. 11, 12, and 20)

(Filed May 27, 1963)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIA D. CONNOR, et al., :
Plaintiffs :
v. : Civil Action No. 616-63
TOMMY C. ISHEE, et al., :
Defendants :

AFFIDAVIT OF TOMMY C. ISHEE

DISTRICT OF COLUMBIA, ss:

I, Tommy C. Ishee, being duly sworn on oath, depose and say

That I am a defendant in the above entitled cause, and, with my wife Maryclaire Ishee, am the owner of Lot 848 in Square 734;

That I caused to be erected in August 1962 along the southwest end of the right of way three posts with gates attached thereto for the purpose of keeping out unauthorized users and to keep the right of way clear of obstructions, debris, refuse and other material placed on it from time to time by plaintiffs Julia D. Connor, Mary Connor, Ann Schreiber, Maureen Horton or their tenants, and by plaintiff Edward G. Gruis and his tenants;

That said plaintiffs Julia D. Connor, Mary Connor, Ann Schreiber and Maureen Horton refused to keep clear and to maintain the said right of way over the rear twelve feet of my Lot 848;

That said posts and gates did not obstruct the use of said right of way by said plaintiffs Julia D. Connor, Mary Connor, Ann Schreiber and Maureen Horton and their tenants because Lots B and 800 in Square 734 owned by plaintiffs Maureen Horton and Ann Schreiber are without garages and that said plaintiff Ann Schreiber has no gate or other aperture whatsoever opening onto said twelve foot right of way;

That the garage of Dorothy B. Grigsby is on the southwest end of said right of way and is outside of the area enclosed by said posts and gates;

That the garages of Julia D. Connor and Mary Connor are of such size that they will not accommodate a modern automobile;

That they have been kept in such a state of disrepair that one of the garage doors has fallen several times onto said right of way and that when an attempt was made to place an automobile in said

in said garage since the granting of the Temporary Restraining Order, the other door to said garage had to be removed before said automobile could be placed in said garage;

That said gates were not locked but were merely latched and could be opened for any legitimate purpose at any time whatsoever and in no way prevented said plaintiffs Julia D. Connor, Mary Connor, Maureen Horton and Ann Schreiber or their tenants from using said right of way for the purposes of the easement granted to the lots of said plaintiffs by deed of Daniel Allman, Jr., Trustee, et al. to Marie Duff on January 9, 1919 as recorded in Liber 4116, folio 447 in the Office of the Recorder of Deeds for the District of Columbia;

I further depose and say that the removal of said gates and posts pursuant to the Temporary Restraining Order issued by the United States District Court for the District of Columbia on May 20, 1963, has once again opened the said right of way to unauthorized use, including the dumping of debris and trash onto said right of way by said plaintiffs who have failed and refused to keep said right of way clear and open and to remove said trash and debris that they have placed on it;

That I am the father of ten children, eight of whom are under the age of ten years, and four of whom are of preschool age;

That as a result of the removal of said gates and posts my children are precluded from using the rear yard of their home as a place in which to play because they must be continually watched and because of the danger of use of said right of way without notice by vehicles both authorized and unauthorized coming up the alley west of said right of way and onto said right of way;

That the temporary fence which I have erected since the granting of the Temporary Restraining Order on May 20, 1963 prevents me from parking my car on my own lot, as a result of which I have been deprived of the material use and enjoyment of my own property;

That plaintiff Edward G. Gruis has not kept the gate to his Lot 46 in Square 734 closed and locked since the issuance of the Temporary Restraining Order;

I further depose and say that Lot 46 in Square 734, owned by

plaintiff Edward G. Gruis and improved by premises 411 Second Street, Southeast, does not have an easement by adverse user across said right of way;

That the use of said right of way by plaintiff Edward G. Gruis and his predecessors in title has been a permissive use;

That prior to the time said plaintiff Edward G. Gruis purchased said Lot 46 in Square 734 in February 1961 he was notified in writing by me by letter dated December 6, 1960 that the use by owners and their tenants of Lot 46 in Square 734, and of the premises 411 Second Street, Southeast, on said lot was permissive;

That on December 6, 1962, because of abuses in their use of said right of way by plaintiff Edward G. Gruis and his tenants, I withdrew from Edward G. Gruis and his tenants, in writing, permission to use said right of way across the rear of my property;

That said plaintiff Edward G. Gruis had adequate notice well in advance of the time that he purchased the property or began remodeling premises 411 Second Street, Southeast, that he would not be able to obtain oil deliveries or trash removal over the rear twelve feet of my property, and that he had adequate time to arrange for such services to be supplied through alternate points of ingress and egress available to him;

That said Lot 46 in Square 734 and the premises 411 Second Street, Southeast were not landlocked as claimed by plaintiff Edward G. Gruis prior to 1924 nor thereafter so as to require the use of said right of way;

That the premises 411 Second Street, Southeast on Lot 46 in Square 734 faces Second Street, Southeast, a public roadway and has access to Second Street, Southeast through a basement entrance to premises 411 Second Street, Southeast, from the front of the property along Second Street, Southeast;

That the premises 411 Second Street, Southeast on Lot 46 in Square 734 also has access to D Street, Southeast, another public roadway, by means of an alley that runs from D Street, Southeast to the northern fence line of premises 411 Second Street, Southeast, owned by plaintiff Edward G. Gruis;

That this alley is about 60 feet in length from the sidewalk

along D Street to the northern fence line of premises 411 Second Street, Southeast;

That this alley is being regularly used by seven property owners for the removal of trash and the supplying of fuel to their properties;

That the fence which separated the rear of said Lot 46 in Square 734 owned by plaintiff Edward G. Gruis abutted the east end of my Lot 848 in Square 734 and stood completely on my Lot 848 and not at all on any portion of Lot 46;

That plaintiff Edward G. Gruis, his agents and employees, trespassed on Lot 848 owned by me and my wife when they tore down said fence in March 1963 in the course of remodeling the premises of said Lot 46 in Square 734;

That plaintiff Edward G. Gruis caused to be erected a new fence and put a gate opening onto said right of way without my permission and without first having obtained a permit to erect said fence from the District of Columbia;

That the premises on Lot 46 was erected in 1903 and that it was not until 1924 that plaintiff Edward G. Gruis claims an opening was made in the fence for a walkthrough to be used by and for the benefit of owners and tenants of Lot 46 in Square 734;

That I am accustomed to park my automobile on my own land in a position parallel to but not on said twelve foot right of way;

That on several occasions I was compelled to stop my car on said right of way because large obstructions placed on said right of way by plaintiffs and their tenants prevented me from ingress to my own land;

That on several occasions I was prevented from entering upon said right of way to reach my own land because large obstructions placed upon said right of way by plaintiffs and automobiles owned by plaintiffs or their tenants and parked upon said right of way completely blocked said right of way.

/s/ Tommy C. Ishee

Subscribed and sworn to before me this 27th day of May, 1963.

/s/ William D. McBee
Notary Public

My commission expires

Oct. 14, 1967

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIA D. CONNOR, et al. :
Plaintiffs
vs. : Civil Action No. 616-63
TOMMY C. ISHEE, et al. :
Defendants :

AFFIDAVIT OF DONALD LUKENS

DISTRICT OF COLUMBIA, ss:

Donald Lukens being first duly sworn on oath deposes as follows:

(1) I am the tenant of premises 172 North Carolina Avenue, S.E., improved by a house and a garage, under lease from Julia D. Connor and Mary Connor, owners.

(2) I notified landlords that I was unable to obtain vehicular access to the said garage by reason of the erection of certain posts, fences and fencing. Attempts to park an automobile within the subject garage were unsuccessful. It was impossible to maneuver an automobile into the garage by reason of the aforesaid obstructions. Being unable to park within the garage upon the leased premises, I was forced with great difficulty to locate parking space on the public streets. On two occasions a tire was stolen from my automobile while parked upon the public street.

(3) The removal of the aforesaid posts, fences and fencing under Temporary Restraining Order issued by this Court has removed the obstruction and, since the removal thereof, it has become possible to park an automobile within the leased garage facility. I have utilized the subject garage facility continuously since the removal of the aforesaid obstructions by parking therein a 1963 Buick.

(4) Money damages would be an inadequate substitute for use of the garage facility for off-street parking at the home occupied by me.

/s/ Donald Lukens

I, Donald Lukens, being first duly sworn on oath say that I have read the foregoing Affidavit by me subscribed, and the facts therein stated of my personal knowledge are true and those stated upon information and belief I verily believe to be true.

/s/ Donald Lukens

SUBSCRIBED AND SWORN TO before me this 28 day of May 1963.
Alma B. Newell, Notary Public, D.C. My Comm. expires: 3/14/65

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIA D. CONNOR, et al., :
Plaintiffs :
vs. : Civil Action No. 616-63
TOMMY C. ISHEE, et al., :
Defendants :
:

AFFIDAVIT OF ANN F. SCHREIBER

DISTRICT OF COLUMBIA, ss:

Ann F. Schreiber being first duly sworn on oath deposes as follows:

(1) I am the owner in fee simple of Lot 64 in Square 734, improved by premises numbered 174 North Carolina Avenue, S.E. I purchased the subject property specifically together with the right of way of record over the rear 12 feet of the property of defendants Ishee.

(2) There is a gate in my back yard fence which serves as access to the subject right of way over the rear 12 feet of the property of defendants Ishee. During the entire period of my ownership I have utilized the subject right of way for general alley purposes for the use and benefit of my lot, occupied by me as a residence, excepting to the extent that such use has been unlawfully impeded, obstructed and otherwise interfered with by defendants' actions. Such use by me of the subject right of way includes, but is not limited to use thereof as a rear service entrance to my home, and for the removal of trash by the District of Columbia Department of Sanitation.

(3) The posts, gates and fencing, which were removed under temporary restraining order issued by this Court, constituted an obstruction to me which made it impractical for use of the subject right of way area by me.

(4) During the entire period of time that I have owned my subject property, I have used my best efforts to keep the subject right of way free and clear from trash and debris, and have periodically raked and cleaned the subject right of way area, the most recent occurrence being within the last week. The accumulation of trash and debris on the subject right of way has been caused primarily by defendants' large dog knocking over trash cans. Until the commence-

ment of this suit, defendants Ishee have continuously maintained their subject rear yard in an untidy and unsightly condition.

(5) Just prior to the issuance of the temporary restraining order by this Court, defendant, Mrs. Ishee, dumped trash and debris over the fence at the rear and into the yards of my property and that of Mrs. Horton who lives at 176 North Carolina Avenue, S.E.

The actions of defendant, Mrs. Ishee, have tended to be violent and abusive and a dangerous situation will again arise unless the Court issues a preliminary injunction on the terms of the temporary restraining order.

(6) Defendants Ishee have very frequently parked automobiles specifically within the subject right of way area during the pendency of this dispute under circumstances where defendants Ishee could park their car on their own property without encroaching upon the subject right of way.

/s/ Ann F. Schreiber

I, Ann F. Schreiber, being first duly sworn on oath say that I have read the foregoing Affidavit by me subscribed, and the facts therein stated of my personal knowledge are true and those stated upon information and belief I verily believe to be true.

/s/ Ann F. Schreiber

SUBSCRIBED AND SWORN to before me this 28th day of May, 1963.

/s/ Alma B. Newell
Notary Public, D.C.

My commission expires:

March 14, 1965

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIA D. CONNOR, et al.	:	
Plaintiffs	:	
vs.	:	Civil Action No. 516-63
TOMMY C. ISHEE, et al.	:	
Defendants	:	

SUPPLEMENTAL AFFIDAVIT OF EDWARD G. GRUIS
DISTRICT OF COLUMBIA, ss:

Edward G. Gruis being first duly sworn on oath deposes as follows:

(1) There is no public alley that provides access from the rear

of my Lot 46 in Square 734 (409-411 2nd Street, S.E.) northward to D Street. I have observed that the 7 lots north of my property, namely, Lots 30-36 inclusive, improved by 151-155 D Street and 401-407 2nd Street have utilized the rear yards of 401-407 2nd Street as a right of way for the removal of trash, garbage, etc. However, the title to my property discloses no rights to the use of the rear yards of 401-407 2nd Street, S.E. for the benefit of my premises located at 409-411 2nd Street, S.E. Additionally, the rear yards of 401-407 2nd Street have never been used in any manner or in any respect for the use and benefit of the ownership 409-411 2nd Street, S.E. to the best of my knowledge and belief. Moreover, the rear of said premises 401-407 2nd Street, S.E. has been separated from my property located at 409-411 2nd Street by a fence with no gate abutting the rear of 401-407 2nd Street. There is, therefore, no claim of record or by reason of use to right of way access for the benefit of my property over the rear yards of premises 401-407 2nd Street, S.E.

(2) The plaintiff, Tommy C. Ishee, in his affidavit has referred to a "basement entrance" to my property from the front on 2nd Street. The so-called "basement entrance" is in fact an entrance to the lower lobby and serves the apartment units located on the lower level. This area is fully finished and decorated in the same quality, character and appearance as the upper lobby which serves the apartments on the upper levels. The so-called "basement entrance" has not been designed or used as a "utility entrance" for the carrying of greasy fuel oil hoses from delivery trucks through the lower lobby, past apartments and through the back exit to the utility area adjacent to the right of way over defendants Ishee's property, where the fuel oil supply line to the fuel oil storage tank necessary for heating water which serves the 16 apartment units within the building and the carrying of trash and garbage which have accumulated from the 16 apartment units through the lower level lobby would create an impossible condition and irreparable injury. Money damages would not adequately compensate for the loss of use of the rear utility access across the subject right of way over the rear 12 feet of defendants' property to the public alley.

(3) At the time I purchased the subject property, there was a fence along the northern boundary of the subject right of way. Defendants Ishee caused the removal of said fence during the pendency of this dispute.

(4) During the entire period which I have owned the subject property, I have utilized my best efforts to avoid deposits of refuse upon the subject right of way over defendants Ishee's property. I have absolutely no recollection of having received notice by Tommy C. Ishee in writing by letter dated December 6, 1960 that the use by owners and their tenants of my Lot 46 in Square 734 and of the premises 411 - 2nd Street, S.E. on said lot was permissive. During the period of time that I have owned the subject property, said right of way over the rear 12 feet of defendants' property has continuously, openly and notoriously been used as a right of way for the benefit of said Lot 46 in Square 734 for ingress and egress for fuel deliveries, trash and garbage removal as a rear service entrance and for rear tenant access serving the apartment house located thereon, all of which use has been continuously adverse and hostile to the ownership of said Lot 848 in Square 734, owned by defendants Ishee until, during the pendency of this action, on May 16, 1963, when defendants caused two posts and chicken wire to be erected across the gate at the rear of my property.

(5) I admit having received a letter of December 6, 1962, purporting to revoke a license which never existed. I have never sought or obtained consent from defendants Ishee to use the subject right of way for the subject purposes.

(6) During the year 1962 I caused to be removed a very old fence along the rear (west line) of my property. During the entire period of my ownership of the subject property, a doorway or gate existed in said fence. I am informed and believe that said doorway or opening continuously existed in said fence since on or before July 25, 1924. Said old fence matched the fencing which extended along the northerly and southerly portions of the rear yard of my subject property. During the period of my ownership, to my knowledge, and, I am informed, dating back to on or before July 25, 1924 and continuously thereafter, exclusive control over said fence and gateway or opening therein has been exercised by the ownership

of my Lot 46 in Square 734. The District of Columbia Government served a notice upon me to repair or remove said fence. Additionally defendants requested that I remove said old fence and replace the same with a new fence. I constructed a new expensive attractive cedar-screen fence at the rear (west line) of my subject property with a gate or opening at the same location where the gate or opening existed in the old fence. Defendants have frequently parked one and sometimes two automobiles within the specific area of the right of way, namely within the rear 12 feet of defendants' subject lot. I have many times observed automobiles parked by defendants Ishee within the subject right of way area at times when there was nothing whatsoever to obstruct defendants Ishee from parking within their own property but not within the subject right of way area.

(7) Since the removal of the fences under the Temporary Restraining Order, my subject property has received indispensable service through the subject right of way for fuel oil delivery for heating hot water and trash and garbage removal.

/s/ Edward G. Gruis

I, Edward G. Gruis, being first duly sworn on oath say that I have read the foregoing Affidavit by me subscribed, and the facts therein stated of my personal knowledge are true and those stated upon information and belief I verily believe to be true.

/s/ Edward G. Gruis

SUBSCRIBED AND SWORN TO before me this day of May, 1963.

/s/

Notary Public, D.C.

My commission expires:

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIA D. CONNOR, et al. :
Plaintiffs :
vs. : Civil Action No. 616-63
TOMMY C. ISHEE, et al. :
Defendants :
:

PRELIMINARY INJUNCTION

This action came on to be heard on plaintiffs' Motion for Preliminary Injunction, having been set for hearing on May 29, 1963, at 10 o'clock A.M., by provisions of the Temporary Restraining Order signed by Judge David A. Pine on May 20, 1963, and the Court having considered the motion of plaintiffs for preliminary injunction and affidavits in support thereof, and having additionally considered the opposition of defendants thereto and the affidavit of defendant, Tommy C. Ishee, in opposition thereto; and it appearing to the Court that the subject posts, fences and fencing have been removed by defendants under the provisions of said Temporary Restraining Order; and it further appearing to the Court that there are disputed issues of fact and law and that the effects of said Temporary Restraining Order, the provisions of which are hereby adopted by the Court, should be preserved pending final hearing of the case on the merits at trial and that the case should be advanced for trial and that the bond should be increased to cover the additional time involved, now, therefore, it is by the Court this 6th day of June, 1963,

ORDERED: That the motion of plaintiffs for preliminary injunction be and it is hereby granted; and it is

FURTHER ORDERED: That defendants, Tommy C. Ishee, and Mary Claire Ishee, and their agents, servants, employees and attorneys and those persons in active participation with them who receive actual notice of this Order by personal service or otherwise, are hereby restrained and enjoined, pending the final hearing of this action from erecting or maintaining posts, fences or fencing which in any manner obstructs or impedes access over the rear 12 feet of defendants' Lot 848 in Square 734 at the rear of defendants' premises 149 D Street, S.E., Washington, D.C. as a right of way for general

alley purposes for the use and benefit of the ownership of Lots 64, 65, 66, D and 800 in Square 734, owned by plaintiffs, Julia D. Connor, Mary Connor, Dorothy Breuninger Grigsby, Maurine T. Horton and Ann F. Schreiber, improved by premises 160, 170, 172, 174 and 176 North Carolina Avenue, S.E., Washington, D.C., and for the use of Lot 46 in Square 734 owned by plaintiff, Edward G. Gruis, and improved by premises 409-411 2nd Street, S.E., Washington, D.C., an apartment house; and that all parties to this action are hereby restrained and enjoined, pending the final hearing of this action, from depositing refuse, trash, or garbage within the subject right of way other than in trash cans or other suitable containers for trash and garbage removal and other than in the manner provided by the regulations for such purposes promulgated by the Commissioners of the District of Columbia; and from obstructing the subject right of way in any manner whatsoever; provided that the plaintiffs shall forthwith give bond with approved surety in the penal sum of \$1,000.00, conditioned upon the payment of such costs or damages as may be incurred or suffered by any parties who are found to be wrongfully restrained or enjoined thereby; and

FURTHER ORDERED that this case be specially scheduled for final hearing at the earliest available date during the term of Court which commences in October 1963.

This order shall be considered as findings of fact and conclusions of law.

/s/ Luther Youngdahl
Judge

ISSUED on the 6th day of June, 1963
at 12:20 o'clock P.M.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIA D. CONNOR, et al., :
Plaintiffs :
v. : No. 616-63
TOMMY C. ISHEE, et al., :
Defendants :

DEPOSITION OF TOMMY C. ISHEE
AND MARYCLAIRE ISHEE

MR. WILKES QUESTIONING MARYCLAIRE ISHEE: *** *** ***

Q. From that date on, did tenants use the gate along the fence in the green line to get to and from the rear of the Gruis' property?

A. You mean, tenants of Mr. Gruis'?

Q. Tenants of Mr. Gruis' place, yes. A. Yes, they did, because the janitor had asked me if it was okay and I said, sure, I have no objection.

Q. When did the janitor ask you that? A. Sometime after we moved in.

Q. How long after you moved in? A. Not very long. I don't know. You see, when we first moved into the place we had left part of our furniture in Herndon to go back and forth a couple of times a week while we were working on the D Street house. So it's difficult for me to remember the exact date. I would say it was a short time after, after we moved in.

Q. Was that a janitor who was there for some considerable period after you talked with him? A. I believe so. I think, he had been there a long time.

Q. And how long did he stay after you talked to him? A. I couldn't say.

Q. To the best of your recollection. A. Well, I really don't know because I didn't see him too often.

Q. Did you ever see him, say, in 1963? A. I believe I did, yes.

Q. In 1963? A. I think I did. I can't swear to it. I honestly can't say.

Q. Did you see him in 1962? A. I may have.

Q. In 1960 did you see him at all? A. I may have, I don't know.

Q. Well, did you see him working there once between 1957 and 1960 after you talked to him? A. Oh, yes, I saw him around when we were working out in back of the place. But the gate was kept closed most of the time after we moved into it and so I just never saw him till they did begin to use it in earnest and it became a traffic-way, a dumping ground.

Q. What was the janitor's name? A. I haven't the faintest idea.

Q. Was he young or was he old? A. He was a rather elderly man.

22 Q. How old would you say he was? A. Sixties, maybe.

Q. Sixty. A. Somewhere.

Q. Did he live on the premises? A. I don't know.

Q. You understood that he had been there a number of years before and he was there a few years thereafter? A. That was my understanding. This is not of my own knowledge, it's just from what you pick up in the neighborhood.

Q. But you saw the man that you talked to about this situation numerous times after you moved in? A. I wouldn't say numerous. I saw him on occasion. But just when, I can't say.

Q. When was the gate first installed in the fence that was generally on the green line? A. I don't know. I know it was there when I first saw the place.

Q. You have no knowledge or information as to when it was first installed? A. The only knowledge or information I have is, as to an exact date, is what I read in Mr. Gruis' claim. I don't know.

Q. Have you ever locked that gate? A. Have I, personally? No, I have never locked it personally.

Q. Did Mr. Ishee ever lock the gate? A. I don't know.

23 Q. Is the gate used for the tenants of Gruis' building to walk through the right of way area and down the public area to First Street? A. I presume it was. I had no objection to anybody using it as so long as they didn't create a nuisance. But when it became an absolute nuisance we had to do something.

Q. When did it become a nuisance? A. Beginning maybe it was 1959 when all of us were getting together to try to buy the apartment

house in order to get the tenants out of it who were creating such a nuisance. Maybe it was 1958. I guess 1958. Prior to that it wasn't objectionable.

Q. Why did it become objectionable at that time? A. I would say the nature of the tenants changed, began to deteriorate considerably. And from a fairly quiet group of tenants it became a group of tenants tossing beer bottles out the windows, as Mr. Gruis knows. And you would never know when you were going to get a beer bottle when you were out in the yard. We had all kinds of debris and rats out in the driveway.

Q. And when did this change occur with respect to types of tenants, you say? A. I would say it was roughly about 1958 because when we first moved in there in 1957 it was not objectionable. The people who lived in North Carolina Avenue had lived there many years, they never set trash or garbage out. But beginning about 1958 it became terrible. The apartment house reached the stage where the entire neighborhood was up in arms, everybody was trying to get groups together to try to buy the place.

Q. And what did you do about it? A. About what?

Q. The nuisance that you said commenced in 1958? A. Well, on many, many occasions we and all of the neighbors called the police and we tried to talk to the people and we tried to do everything. But they were not the type you could talk to. As a matter of fact, it reached the point where I was afraid to talk to them. And they were mostly under the influence of something, I don't know what, some of them. And so you just ceased and desisted. I had tiny children, I wasn't taking any chances.

Q. Was it your desire that they not use the gate at that time? A. I didn't mind them using the gate, it was my desire that they not use it as a public parking lot and not dump old refrigerators and stoves and barrels of clam shells and rags and furniture.

Q. And how long did this situation continue? A. Continued for quite a long time.

Q. Until what date? A. Until we put up the gates.

Q. What gate? A. The gate across the one end of Lot 848, and put a sign up saying Authorized Users Only.

Q. And who were those authorized users? A. Anyone who had per-

mission from us. It was perfectly agreeable to us to have any of the adjoining neighbors use it as we were using it but we simply couldn't have it as a dumping ground and parking lot.

Q. Well, who were the authorized users? A. Apparently they were going to have people along North Carolina use it and I was perfectly willing to have Mr. Gruis use it until we finally had to withdraw permission.

Q. You say you withdrew permission from Mr. Gruis? A. Yes.

Q. When did you give him permission? A. Well, when he was buying the place. We had a group planning to buy it and some of the people in our neighborhood. And Mr. Gruis apparently not knowing that we were doing this had gotten a group together, and I know that I typed a letter to Mr. Gruis telling him that -- he had sent a prospectus along and he said that it had alley access. But Tom and I knew it didn't have alley access. And Tom and I said he was buying a pig in a poke. And I know he talked to Green Kreesack, and I said better let him know that we're perfectly willing for him to use it but before he buys it he ought to know what it was about.

26

Q. What was the date of the letter? A. I remember that was my birthday, it was December 6. Let's see, 1960.

Q. Do you have a copy of that letter? A. Yes, I have.

Q. May I see it, please? A. I don't have it here.

THE WITNESS: You don't have it, do you, Arthur?

MR. WAGMAN: No, I don't.

BY MR. WILKES:

Q. This letter, you say, was typed by you? A. Yes, it was.

Q. And it was mailed to Mr. Gruis? A. Yes.

Q. Did you and Mr. Gruis ever have any other correspondence?

A. Yes, we sent him another letter. In fact, I sent two other letters; one when we withdrew permission, and then I sent him another letter which was returned to me this spring on this matter of Lee Lawrence's screen door that was returned to me unclaimed.

27

Q. Now, this letter you say that you will produce dated December 6, was that before or after Mr. Gruis purchased the property?

Q. Did you ever talk to him about permission to use the right of way after he purchased it? A. As a matter of fact, I don't think I talked to Mr. Gruis until the spring a year ago after that.

Q. Did you talk to his janitor after that? A. I don't believe so. I may have said good morning to him. I know on one occasion he came out and he said that it wasn't all his responsibility. I mean all the trash and things that were there. He said some of the people in along North Carolina had done some dumping too.

Q. When did Mr. Gruis purchase the property? A. Must have been January of 1961 or something like that.

* * *

Q. Did he have the same janitor that you had spoken to before? A. I don't know, I really don't.

Q. You said a moment ago that you talked to Mr. Gruis' janitor from time to time. Was he the same one that you talked to with respect to the right of way? Was he the same man? A. I think he was the same man. If they were different, they were both elderly men. And I saw him infrequently and never paid him much attention. I had Bates hauling stuff away and this man came out and he said that it wasn't entirely his fault, and that some of the other people were also dumping stuff.

Q. And how long did Mr. Gruis' janitor stay there after January 1961? A. I don't know, I really don't.

Q. And you say that the fence that was located in the vicinity, you say one foot west of the green line, had a gate that came down several times? A. Yes.

Q. And you say that you replaced the gate? A. We hinged it and did whatever nailing had to be done to get it back up again.

Q. Who did the work? A. I don't know.

Q. Was it Mr. Ishee or was it somebody else? A. As to who put the hinges, I don't know. Now, I know on some occasions Tom himself nailed some boards back up and so forth. Now, I know I had three or four people working there and I know -- well, when we were building our fence along the side and at the time the fence was being built between Mrs. Prettyman and ours -- I know that some of the work was done on the fence between Mr. Gruis' and ours.

Q. Did Mr. Ishee ever replace the gate in the fence generally along the green line? A. You mean did he?

Q. Did he, personally. A. I think he did but I'm not sure.

Q. Did you? A. No, I didn't. I'm not a very good carpenter.

Q. When did Mr. Gruis or someone working for him take the gate down? A. I think it was sometime in 1961. I know we would have put the gate back but we couldn't find it at that point.

Q. You never saw the gate thereafter? A. No. I don't know.

Q. Did you complain to Mr. Gruis about the removal of the gate? A. Well, I tell you we were complaining -- no, we didn't complain to Mr. Gruis about the removal of the gate. I was complaining about the trash and about the parking. And I was trying to do my best to keep the peace and make the place livable, which was difficult.

Q. Did the removal of the gate have any effect on the use of the right-of-way area? A. Yes, it did, it had a great effect on it.

Q. What effect? A. Well, every wino on the area then used it 30 at night, you go out in the morning and you find litter, bottles, and so forth, and the rear yard of the apartment house became a handy place for them. The rear of our yard and the rear yard of the apartment became a very handy place at night. And of course I had difficulty with the children, but it was mostly the fact that all these characters began using it.

Q. How did you have the problem with your children when the gate was not opened, was not locked prior to the removal of the gate? A. I don't know. It was kept closed. To the best of my knowledge it was closed just about all the time that it wasn't actually being used. I don't know whether it was locked from the inside or not.

Q. Was there a latch on it? A. I think there was.

Q. Do you know whether there was or not? A. Hard to remember. It's been quite awhile since I've seen the gate, I didn't pay that much attention to it when I saw it but I think there was, yes. I think there was some place for closing -- latching it.

Q. How long was the fence down after it was removed by Mr. Gruis up to the time the new fence was installed? A. Several months.

Q. Two? Three? Or what would be your best recollection?

A. Two. Possibly more than two.

31 Q. Did this open your yard to the street? A. No, it opened our yard to four flights of rickety stairs.

Q. Directing your attention to the owners who lived on North

Carolina Avenue, you said that you had no objection to their use of the right of way? A. So long as they used it as a passageway only I didn't object.

Q. In what respect, if any, was it used by the owners of the North Carolina Avenue properties contrary to their rights under the right of way which was established by deed? A. As a dumping ground, parking lot.

Q. As a parking lot and dumping ground? A. Yes.

Q. Who parked the car in the right of way area? A. Oh, a number of people who parked cars along the driveway, there were so many. I would go out in the morning, used to go out and try to get out and there would be four cars parked along the line. And I would sit there and honk like mad and somebody would come out of the apartment, "What do you want, what do you want at this time of the morning?" I drove my husband to work. On many occasions I couldn't get the car out of the grounds, the yard was blocked up completely.

Q. I'm referring to the people who live in the houses on North Carolina Avenue, 160 through 176, on Exhibit 1, did any of those persons ever park their car within the right of way area? A. Oh, yes. They had a lot of boys. I think it's on 172, and on many times they parked there.

Q. At what time? When? What year? A. It was a bunch of boys that have been living there for a couple of years. Prior to that they didn't have garages, they didn't have cars, and they didn't park. And after the new group of people moved in they parked.

Q. What house number are you referring? A. I believe it's 172.

Q. Did you ever call the police about any such occasions? A. Many times.

Q. What precinct? A. No. 5.

Q. About cars that were not authorized to park within the right of way area that were parked there? A. Yes.

Q. Persons residing in 160 North Carolina Avenue, did they ever park there in the right of way area? A. I don't believe. That's Mrs. Grigsby?

Q. Right. A. Mrs. Grigsby has never been any problem. She has never been any problems.

Q. The person in 172, did they park there? A. Oh, yes.

Q. Excuse me -- at 170. A. At 170 they had parked but they asked permission to park.

Q. Who asked permission to park? A. The people who lived there Catrells, I think it is. Their son has a car and he's in the Navy. And on two or three occasions he asked for permission to park.

Q. What kind of car did he have? A. I don't know the make. It was a big black car.

Q. 174. Did they ever park there? A. This summer, yes.

Q. Who is that? A. This friend of Mrs. Roberts.

Q. He has parked his car there? A. Yes.

Q. For what periods of time? A. He was there all day one day.

Q. When? A. I don't remember the exact date. I can produce that.

Q. Was it within the last two months? A. Yes, it was.

Q. In the last month? A. No, it was within the last two months.

Q. Was there just one occasion or had he done that before? A. Well, I wasn't aware that it was his car before.

Q. Had his car been parked there at any other time? A. I don't know whether it was the same car or not. I didn't start taking license numbers until this summer.

34 Q. The owner of 176; did she park there? A. Yes.

Q. Her car? A. Some friends of hers.

Q. When was that? A. Many times in the past. And I know one morning I called the police it was parked there and had been parked there for a good part of the day. That was - I don't know - July or June, something like that, early part of the year.

Q. What year? A. This year.

Q. Did you say anything to Horton about that? A. Yes, I did.

Q. Was the car located in the alley at the time that you spoke to him? A. In the alley, what do you mean?

Q. Parking in the right of way? A. Yes, it was.

Q. As you spoke to her was he parked in the right of way? A. No, he wasn't there at the time but I spoke to her about it later.

Q. Was she there at the time the car was parked there? A. She

wasn't there at the time but I spoke to her about it later.

35 Q. Was she there at the time the car was parked there? A. She had been there earlier. But at the time I went out and told him he was blocking the thing completely and I don't think she was there, no.

Q. Now, other than those occasions that you have mentioned have any of the occupants of 160 to 176 North Carolina Avenue made any use of the right of way that you considered unauthorized? A. Yes.

Q. What were the acts? A. Dumping.

Q. Dumping what? A. Trash, garbage, rubble, building debris, old furniture.

Q. Name who did it and approximately when, to the best of your recollection. A. Well, Mrs. Schriver had a tree torn out, she had the stump dug out, and she had the stump put approximately in the middle of the right of way -- the roadway. And it was there until she moved it, until we requested her to move it away and she refused to move it away until the night after the injunction. And she had an additional pile of forage on the driveway.

Q. Who put it on the driveway? A. She did.

36 Q. Anybody else? A. Well, Mrs. Horton on many occasions when she was periodically fixing over her house, she dumped large quantities of broken cement, brickbats, wood and furniture. And two or three times I had to get a truck in and have it hauled away.

Q. When was that? A. Several times since we've been living there in 1957. Finally, this spring, I had had the way cleared, hired a man to come in and sweep with a broom, clean and haul away some rubble she had dumped there, and the following day, Mother's Day - I remember it very well - we went out and it was completely littered again since about six hours after I had had it completely cleared.

Q. By Mrs. Horton? A. Yes.

Q. Was any of this debris or rubble placed in containers?

A. Well, there was a pile I would say about so high on the ground.

Q. Indicating what? Two and a half; three feet? A. I would say two and a half, three feet high, and about five feet long, maybe, spread out.

Q. Any of that in containers? A. No. There were a couple

of rugs tossed out.

37 Q. By whom? A. Mrs. Horton. And there were two or three trash cans, galvanized cans without tops located way up. And then there were eight or ten grocery sacks full of all kinds of debris which had partially broken open and spilled all over the place. They were broken open sacks.

Q. You say they were broken open? A. Some of them.

Q. And how were they broken open? A. Well, I presume they had been stuffed too full and they split.

* * * *

47 Q. Now, reference has been made to a tree. Where was that tree located? A. On the corner of Mr. Gruis' property.

Q. Was any part of the lower portion of the trunk in your property at all? A. No.

Q. Where was it in relationship to the fence that extended along the green line? A. Inside the fence.

Q. Against the fence or several feet from it, or where? A. It wasn't right against it, no. It was in from it some.

Q. So the fence that Mr. Gruis removed, you say, was to the west of the tree? A. Yes.

Q. About how far west of it would you say? A foot? Two feet? A. It wasn't two feet. It was a foot and a half maybe.

48 Q. To the best of your recollection, how far was it? A. To the best of my knowledge I would say about a foot or foot and a half.

Q. You said no part extended to your property? A. To the front, no.

Q. You're certain of that? A. Yes, I am reasonably certain of that.

Q. Did the tree extend over your property at any point? A. Now, by tree do you mean the trunk?

Q. The branches or the superstructure above the ground? A. Yes, a very large, heavy branch extended completely over our property and rested on the roof.

Q. Was it that way when you moved into the house in 1957? A. The branch extending over the property?

Q. Yes. A. Yes.

Q. And on the roof of your house? A. I can't say that. I don't know, I don't remember.

Q. Was the trunk of that tree completely on Mr. Gruis' property at the ground? A. To the best of my knowledge it was inside the green fence. I suppose so.

Q. Did any part of it extend over to the property north of Mr. Gruis?

* * * *

52 Q. Do you drive? A. Yes.

Q. How many cars do you now have, you and Mr. Ishee? A. One.

Q. What kind of car is that? A. Mercury station wagon.

Q. Has that ever been parked in the right of way area? A. Not on the right of way. I may have gotten the wheel over six inches on there. I used to pull it up and park it parallel with the right of way. Maybe six or eight inches of it got onto there.

Q. You used to park it in that location customarily? A. After the fence that we had along there came down, yes. Before that time I used to pull it in parallel approximately on the side of the garage at 172. That wasn't too good an idea because that garage at 172 -- I'm sorry, twice they backed out and smashed the rear of our car. And so we decided that wasn't such a good idea and so then I pulled it up parallel with the right of way.

* * * *

61 Q. How old a tree was this would you say? A. Well, my son and a friend were trying to count the rings. I don't know how much they counted, but I think 75. And so I don't know.

Q. Approximately how large was it in diameter? A. Approximately three feet in diameter. Two to three.

* * * *

64 Q. Now, it was the fence that was about one foot to the west of the Gruis property line, you say, that was made of plank wood? A. Yes.

Q. Was there a fence along Gruis' north property line at the rear of his yard? A. Yes, there was.

Q. Describe that fence. A. It was plank.

Q. Vertical or horizontal? A. Vertical.

Q. Was that the same type of fence along the west, to the west?

A. No.

Q. It was not the same type? A. It was not of the same wood no.

Q. In what respect did it differ? A. Well, I think one was pine, to the rear, and the other one was of hardwood. I'm not sure it was pine but they were not the same type wood anyway.

Q. Was there a fence along the south side of the property line of the Gruis property? A. South side?

Q. The south of the back yard of the apartment house? A. You mean by Mrs. Harlan's place?

Q. Along the south side of it.

* * * *

65 Q. And what type of fence was that? A. That was a plank fence.

Q. Was that pine or hardwood? A. I didn't pay much attention to that because there was only about a foot and a half that I could see. I don't know. It was a high fence, a very high fence. It was much higher than the one in the back.

Q. You mean much higher than the one along the general area of the green line? A. That's right.

Q. How much higher? A. I'd say a foot and a half, two feet higher. It was a very high fence, that's all I remember about it.

Q. Along this diagonal line between the Gruis property and 17 which is Horton's, was there a fence at that location? A. I don't know. I don't know about that.

* * * *

MR. WILKES QUESTIONING TOMMY C. ISHEE: *** *** *** ***

Q. Did you ever repair that fence that's in the area green that existed there when you moved in? A. Small repairs. Never extensive repairs.

Q. Yourself personally or did you hire somebody to do it? A. My wife does a lot of this hiring so maybe her memory on this but I've done minor repairs on it myself.

Q. An order was issued to remove that fence. Did you ever get a copy of that order? A. No, sir, it wasn't directed to me, I don't believe.

Q. What was the condition of the fence when it was removed by Mr. Gruis? A. It was pretty much as it had been for many years.

was not in very good state of repair.

Q. Did you ever tell Mr. Gruis or anyone associated with him to replace that broken down fence? A. No.

Q. You're familiar with the cedar screen fence that went up in the place of the fence that we have just been talking about in the area of the green? A. Yes.

Q. Is that fence equal to the one, or better or worse than the one that was taken down by Mr. Gruis? A. Well, the fence that Mr. Gruis took down sat at least a foot over onto my property, the one he put up, although we suggested to the carpenter that if he was putting up a new fence he might as well put it on his land; it sometimes sits over on my property. As far as the desirability of a fence, a fence is a fence, of course. And as far as looks, why, if I was putting it up I would turn the pickets towards me and not towards you but this is an opinion. And if it is a great improvement, I would have to agree that a new fence is better than an old fence.

Q. Describe the fence that he took down. A. It was a plank fence, boards running upright. As I say, it was not in an excellent state of repair. Some of the boards were rotting off, frayed edges at the bottom. Otherwise it served very well as a fence but it was my fence.

Q. Other than this opening in the old fence that was along the green line, was Mr. Gruis' rear yard fenced in? A. I don't know what Mr. Gruis' rear yard is. I don't know whether it was fenced in or not. My personal opinion is that it would be. But I don't really know, although I had that house for sale, an exclusive listing on it at one time and I was in it and through it and around it, to the best of my recollection it was fenced in around. I think he had a fence around it. I mean open parts. I don't even know where it bordered but it bordered two or three other properties also.

Q. Did you at any time since 1951 walk into the back yard owned by Mr. Gruis? A. Well, yes, I had the apartment listed for sale from a previous owner before Mr. Gruis.

Q. Well, if you stood in the back yard and looked toward D Street, was there a fence along that side? A. Yes.

Q. What type of fence was that? A. Just plain fence.

Q. And if you had turned around and looked toward the court toward North Carolina Avenue, was there a fence on that side? A. My recollection is that there was. All the fences there were plain.

Q. And were these fences the same height or different heights? A. I don't believe they all were the same height.

Q. Which one was different? A. The one -- I'm almost sure again this is to the best of my recollection, I don't observe these things intending to keep them in my mind for Court. My recollection is that the one to the south that ran along what would be his south property line was higher quite a bit more than the fence that ran across where the green line is. I would say maybe about a foot higher, as a matter of fact.

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To reinforce that there was an extra fence which was an extension of this fence which here in your sketch would be at 176 North Carolina. There was a gate there also which was covered up at the top and the same type of fence, but it was high enough to walk through so that the fence represented by the green line here was probably not over six feet whereas that fence there must have been seven feet high.

Q. Why do you say that the old fence was a foot to the west where was it located in relation to the property line? A. It was approximately a foot inside the property line.

Q. Inside whose property line? A. Mine.

Q. When did that come to your attention? A. It's always been to my attention. It's obvious, anybody looking at the fence could tell because my line lays four inches inside the wall of the adjoining row house, and it runs straight back as you have it represented here. And this fence set back about a foot inside of that line.

In other words, as you look down the side of the line of the house it's obvious that this fence is protruding.

Q. So you noticed it there at the time you bought the house? A. Well, I don't know, I don't know that I noticed it at the time I bought the house. But over the time it's obvious that the fence is on my land.

Q. Did you ever ask Gruis or anybody associated with him to move it? A. No, I did not.

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Q. Did you ever ask him to move a tree? A. I don't know whether the question just as you phrased it is correct or not but I would say that he was asked several times to do something about the tree. Now whether it involved necessarily removing is an expert opinion. It was leaning. The tree that was leaning there was leaning heavily across my line.

Q. Well, was it possible to cut the tree where it came over your line? A. It would have been a very strenuous cut, sir. The trunk of the tree I would say was approximately two feet in diameter. Now, for me to find where my line ran up in that tree and to slice that tree. It would have been a monstrous cut. In addition to this, to cut the limbs off on my side, the limbs had been cut off on the apartment house side, you see, and this lets the tree lean because the heavy branches would be on my side and on the side on the property adjacent to me.

Now for me to cut the limbs off on my side might have toppled it over on the other property, or if the limbs had been cut off it might have toppled off on my side.

Q. I'm talking about where did you want Mr. Gruis to cut it? A. I wanted him to take whatever action was necessary to remove this danger, that's the danger I was talking about, that it was causing.

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Q. It couldn't have been cut at any place than at the bottom? A. I didn't have anything -- my wife had most to do with this and I never specified as to what should be done. I did not specify what he should do. But whatever it was to remove the danger, that should be done.

Q. Did you ever do anything about it? A. No, I didn't.

Q. Why didn't you have the tree cut? A. As I say, for me to cut the limbs off on my side, I couldn't without entering on his property cut the tree, sir, which I wouldn't have done, to cut the limbs off on my side. I think this was explained at that time. You see, the limbs having been cut on the apartment side of the house, as I say, would have caused the tree to lean heavily toward my house and toward the house directly to the east of it.

Q. Was any part of it resting on your house? A. Yes. Well, I say resting. I don't know this.

Q. Touching? A. My answer to this would be yes, I think. I think that there were limbs probably in the wind and probably touching because there was a hole knocked on the roof which I wasn't aware of.

Q. Well, how big were the limbs where they were touching your house? A. That's a very hard question. The limbs that protrude out over my property were, I'm guessing again, but certainly they were anywhere from six inches to a foot in diameter.

38 Q. How big were the branches that touched your house? A. Well, the big limbs came over the house. Now, the size of the branches that were rubbing against the roof, the whole thing was hanging over the house, you see, and if the limbs had been cut off of either side of the house immediately east of me, I think it would have caused the tree to lean more heavily and crash on my house.

It would have meant the same thing to that property there because of the limbs were cut off of this side next to the apartment house and therefore the tree leaned away. It was carried down by the heavy branches and they were heavy branches.

Q. But how far is it from the place where the tree first crosses your line and touches the other? A. Touches the house or leans over

Q. Touches it. A. Well, I don't know exactly where the first touches it. Let me put it this way. I would estimate, I don't know, from the trunk of the tree to the corner of my house - and this is the general direction that the limbs came - it would be something in the neighborhood of 20 feet. That would be my guess.

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIA D. CONNOR, et al. :
Plaintiffs :
vs. : Civil Action No. 616-63
TOMMY C. ISHEE, et al. :
Defendants :
.

Washington, D.C.
December 2, 1963

The above-entitled action came on for trial on the merits, before the HONORABLE BURNITA SHELTON MATTHEWS, United States District Judge, at 12:15 p.m.

APPEARANCES:

On behalf of the Plaintiffs:

JAMES C. WILKES, JR., ESQ.

On behalf of the Defendants:

ARTHUR M. WAGMAN, ESQ.

Thereupon--

DOROTHY BREUNINGER GRIGSBY

called as a witness by the plaintiffs, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WILKES:

Q. State your full name, please. A. Dorothy Breuninger Grigsby.

Q. Where do you now reside? A. 160 North Carolina Avenue, S.E.

Q. And that is Lot 800 in Square 734 or the westernmost of the five houses on North Carolina Avenue that are the subject of this dispute? A. Yes.

Q. Are you related in any way to Daniel Allman, who owned property involved in this suit, dating back to the year of the commencement of the Civil War, 1860? A. He was my mother's uncle.

Q. Your mother's uncle? A. My mother's uncle.

Q. I see. Now, what was the date of your birth? A. 1892.

The above-entitled action came on for trial on the merits, before the HONORABLE BURNITA SHELTON MATTHEWS, United States District

Q. What age are you today? A. Seventy-one.

Q. What is the date when you were first familiar with the property involved in this suit? A. I remember my mother buying this place about 1898.

THE COURT: Who bought it?

THE WITNESS: My mother and father.

BY MR. WILKES:

Q. And what were the names of your mother and father? A. Arthur and Julia Breuninger.

THE COURT: By this property, you are speaking of 160 North Carolina Avenue?

THE WITNESS: Not the present house, there was another house on the property at that time.

THE COURT: I see.

BY MR. WILKES:

Q. Have you actually occupied as a house any property involved in this case? A. Yes.

Q. What property and during what years? A. In 1913, my father built the house, the present house, and we moved into it, sometime that year or the next. My father was ill at the time, which delayed our moving in, and I was there until 1919, when I married and went out of town. In 1937, I came back to this house and have been there ever since. But those years I was married, I made two or three visits a year to my mother and father and stayed anywhere from two weeks to a month each time.

Q. Did your mother and father occupy any of those houses as their residence? A. From 1913 until my father died in 1937, and my mother died in 1955.

Q. So during the entire period when you were married and away and came back from time to time, your parents made this their home, is that correct? A. Yes.

Q. Are you familiar with the time -- I withdraw that statement. I show you what has been marked as Plaintiffs' Exhibit No. 16 for identification and I will ask you to identify that, if you can, please. A. It is a bill for the garage which my father built on the property in 1924.

(Bill for building garage, dated July 25, 1924, was marked Plaintiffs' Exhibit No. 16 for identification).

BY MR. WILKES:

Q. And that is the garage that is located to the rear of Lot 800 where you now reside today? A. Where I now reside.

Q. Are you also familiar with the garages that are at the rear of the two Connor properties? A. They were built at the same time by the same contractor.

* * * *

MR. WILKES: I offer that as Plaintiff's Exhibit No. 16

THE COURT: Will you show it to Mr. Wagman.

MR. WILKES: I have shown it to him.

MR. WAGMAN: No objection.

THE COURT: Very well, admitted.

THE CLERK: Plaintiff's 16 into evidence.

(Plaintiff's Exhibit No. 16 was received in evidence.)

BY MR. WILKES:

Q. Now, back in 1924 when these three -- well, when your garage was built, was any use made of the garage? A. Well, yes, we had tenants as soon as it was finished. Mr. McCray and his daughter.

Q. Now, there is in evidence a deed to Mr. William H. McCray, June 5, 1903, whereunder he took title to the property now owned by Gruis, Lot 46. When these garages were constructed, and specifically your garage in 1924, did he make any use of your garage? A. We rented it to the McCrays, father and daughter.

Q. What did Mr. McCray have to do with the Folger Apartment there? A. Well, he came out the back gate to our garage.

Q. Was he a tenant there? A. No, he owned the building.

Q. He owned the Folger Apartment? A. The apartment, he built it himself, he was a builder.

Q. I see. Now, when he constructed this back in approximately 1905, did he at that time construct any fence along his rear property line? A. He always had a fence there.

Q. How did he get from the apartment house to your garage? A. Out the gate in his fence and down where that yellow mark is, into our garage.

Q. And he passed from the back of the apartment on Lot 46 through, you say, an opening in the gate? A. Yes.

Q. And down the area which is marked in yellow on Plaintiff's'

Exhibit No. 1, to your garage which is located at Lot 800? A. Yes.

Q. What kind of car did he have at that time, do you recall? A. I couldn't remember there were two cars in there, his daughter had one and he had one, but I don't remember the names of the cars, the makes.

Q. I see. And then how long did he continue to use that garage? A. Well, up until the time the daughter got married, her car was there, and I couldn't say how long the father was there. I guess until he moved away from the building.

Q. The deed in record which is a conveyance from Mr. McCray to a David Bernstein in 1937, is that helpful to you in any respect with respect to establishing the sequence of events in this case? A. That was the year I came back home and he had moved from the apartment, I believe, at that time, taken a smaller apartment on Sixth Street.

Q. I see. Then, was there a renovation of this apartment building after Mr. McCray moved? A. Yes, it was cut up into small apartments.

Q. I see. Did the fence remain -- the gate remain in the fence at the rear of the apartment? A. Yes.

Q. Now, going back, if you will, please, to the construction of the garages in 1924 on the rear of the properties of Connor, Connor and Grigsby, Lots 65, 66 and 800, and also with reference to the properties of Schreiber and Horton, was any ingress or egress or use made of the area colored in yellow and also the southern twelve feet of Lot 849? A. Well, from the time the garage was put up, we had an alley there. My mother went down it every day to the store, automobiles came up it, people in the apartment used it coming down.

Q. How did you get your ice? A. I think our ice came in the front door.

Q. I see. A. I think that did.

Q. So it was used during that period of time, you say, for access by foot? A. Yes.

Q. Where were people going -- A. Down to First Street.

Q. -- at the bottom of this public alley? A. The Safeway down there.

Q. The Safeway Store? A. Yes, sir.

Q. Were there any other stores located there? A. Oh, yes, the liquor store, shoemaker, I don't recall what else, grocery store, yes, another grocery besides the Safeway.

Q. Well, how frequently did people use the extended public alley in the area of the yellow and the rear twelve feet of Lot 849? A. Well, the people who had cars used it all the time, the people who lived in the apartment came up there in cars, parked them in the back of the apartment.

THE COURT: When you say they parked them in back of the apartment, do you mean that they went through this gate that was in the back of this property here that you refer to as the apartment?

THE WITNESS: The people who lived in the apartment would go in that gate, come up the alley and go in that gate to the apartment.

THE COURT: Yes, but you said they parked their cars?

THE WITNESS: They would park their cars there.

THE COURT: Where would they park them, that is what I am trying to find out.

THE WITNESS: Up against the fence of the apartment. While they were in, I don't say they parked them there at night, but I mean where you'd leave your car on the street, they'd come up the back because there was a back stairway that went up to those apartments and I think most of the people who lived in the back used the back entrance instead of the front.

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BY MR. WILKES:

Q. Was any surfacing placed in the area colored in yellow when the garages were constructed? A. It was all concreted, when the garages were finished, we had a concrete alley in back of us, our part.

THE COURT: Do you know who concreted it?

THE WITNESS: No, I coul~~dn't~~ say that.

BY MR. WILKES:

Q. Was that concrete in the yellow area ever driven over, does it show any signs of wear and tear? A. It is all broken up now, you could only find little pieces of it here and there, from the traffic over it.

Q. Since 1924? A. Yes.

Q. Now, how about trash, was the right of way ever used in connection with the disposal of trash? A. Our garbage and trash was collected, everybody's was collected up in that alley.

Q. How about coal? A. The coal came in the front, we had a front-cellar entrance and it was better for the coal bin to come in the front, for us, but there were other people that had to come up the alley.

Q. Was the area colored yellow ever used for coal trucks by anyone else. A. Oh, yes.

Q. When you say the alley, I just want to be sure whether 12 you are talking about the red part or whether you intend to include the yellow? A. Well, I mean up there, we always had things delivered to the back, any building materials, they would be delivered there.

Q. How did you happen to know Mr. McCray, who came back through here to get to your garage, through the opening in the gate, back commencing in 1924? A. I went to school with his daughter, she was my best friend.

Q. What was her name? A. Harriet McCray.

Q. In connection with this use of the area marked yellow -- and for purposes of the record, I would like to have it understood that when I refer to the area marked yellow, I am also referring to the south twelve feet of Lot 849 -- did you seek any permission for such use from the owners of Lot 848 or 849? A. Did I?

Q. Yes, did you seek permission from the Ishees or anyone who ever owned the Ishee property before? A. No.

Q. Lydia and May Meaders, the evidence shows, were the owners before Ishee. Did you ever request permission or get permission 13 from them to use the right of way area? A. No.

Q. Or from Lee Walsky? A. No, don't know him.

Q. Or Bessie K. Brown? A. No.

Q. Or D. R. Romines? A. No.

Q. Did you have any knowledge or information or belief with respect to any rights under a deed to the right of way area that is the portion marked yellow on Plaintiffs' Exhibit No. 1 which is within Lot 848 only? A. Well, all I know is that for years there was some talk of an alley there, before we actually got it, and I just took it for granted, I guess, that the necessary arrangements had

been made to use that property, that's all I would know about it.

Q. So you proceeded to make such use, is that correct? A.

That is right.

Q. When Mr. McCray started coming out this area from the apartment house to your garage, who did he get permission from, if you know? A. Nobody, that I know of.

Q. Now, the Connors, who now own 170 and 172 North Carolina, being the properties immediately to your east, are they related to you in any way? A. Cousins.

Q. They are cousins? A. Yes.

Q. Are they related to Allman? A. They were his granddaughters. Their mother was my mother's first cousin.

Q. Now, there came a time when the Ishees did something in connection with the area in yellow, is that right or wrong? A. It is right.

Q. And when was that, to the best of your recollection? A. It was a little over a year ago; August, I believe.

Q. August, 1962? A. Yes.

Q. And what did they do? A. They put up some, supposed to be gates, I guess, but they were very heavy, blocking off the alley.

* * * *

Q. Now, I show you what has been marked as Plaintiff's Exhibit No. 17 for identification and I will ask you if you can identify that photograph?

MR. WAGMAN. No objection.

THE WITNESS: I was there when it was taken.

BY MR. WILKES:

Q. What does it show? A. The construction of this fence, just starting it.

Q. In August of 1962? A. Uh-huh.

Q. That was done by the -- at the direction of Mr. and Mrs. Ishee, the defendants in this case, is that correct? A. Yes.

Q. Did you protest the erection of these or did anybody do so on your behalf? A. Yes, my cousin came up, two cousins, they both talked with Mrs. Ishee.

Q. What are their names, please? A. Ceylon and Hugh Curley Boswell.

* * * *

Q. I show you what has been marked as Plaintiffs' Exhibit No. 18, 19 and 20 for identification and ask you if these are additional photographs which were taken of the construction by Ishee at the time that you referred to before, in August of 1962? A. Yes, there I am standing in the alley.

16 Q. That is on Plaintiffs' Exhibit No. 20? A. Uh-huh.

Q. Now, the 170 which is written on a garage just beyond the fence, fencing, gates, whatever you may term them, that refers to 170 North Carolina Avenue, is that correct? A. Yes.

Q. That shows one of the garages, and your garage is at the rear of 160, is that correct? A. Yes.

Q. Connors other garage is the rear of 172, is that correct? A. Yes.

* * * *

17 Q. Mrs. Grigsby, I show you what has been marked as Plaintiffs' Exhibit No. 21 for identification and I ask you if you recognize that? A. Yes, I recognize it.

Q. Where is that photograph taken from, in relationship to the property involved in this case? A. Well, I stayed on a line with my garage looking up toward the apartment.

Q. I see. Do you recognize the car that is within the right of way area? A. No -- it looks like Mr. Ishee's station wagon.

MR. WILKES: I see. I offer that as Plaintiffs' Exhibit No. 21.

* * * *

Q. I show you Plaintiffs' Exhibit No. 22 and ask you if you recognize that? A. Here I am in the door of my garage.

Q. That is you standing by the door of your garage? A. Of my garage.

18 Q. And this is looking eastward toward the apartment building?

A. Yes.

Q. I see. Now, the area that is to the right in this photograph, of the fences, is that the area that is in white on Plaintiffs' Exhibit No. 1, which is the setback of the garages south of the right of way? A. Yes.

Q. And do you recognize that automobile? A. Well, it looks like a side view of the same one in the other picture.

Q. Mr. Ishee's? A. Yes.

* * * *

BY MR. WILKES:

Q. I show you Exhibit No. 23 for identification and ask you if that is a photograph which is looking toward the east to approximately your garage through this area of setback of the garages, which is south of the right of way? A. Yes, it is.

* * * *

Q. Now, when these barricades were erected in August of 1962, did you retain counsel in this case? A. Soon after.

Q. Within what period of time, approximately, after the erection? Well, I don't exactly remember, I'd say about a week, maybe less.

Q. Now, you are one of the parties to a complaint pursuant to which a temporary restraining order was obtained, after negotiations failed, on May 20, 1963, is that correct? A. Yes.

Q. And you were one of the parties plaintiff who obtained a preliminary injunction against the re-erection of the fence by the defendants Ishee on June 6, 1963, is that correct? A. Yes.

Q. Mrs. Grigsby, did the erection of what these photographs show, however they might be described, interfere with use of the right of way that is involved in this case?

A. Yes.

MR. WAGMAN: Objection. By whom? That is a general question, too general for the witness to answer, it should be specific.

MR. WILKES: I will withdraw the question, Your Honor please.

THE COURT: Very well.

BY MR. WILKES:

Q. Mrs. Grigsby, did you ever try to move what they actually put up in this place? A. Did I ever what?

Q. Did you ever try to move -- did you ever try to move these gates or fences or fencing or posts or ~~however~~ they might be described? A. No.

Q. In your opinion, would you be in a position to do so, during all types of weather conditions? A. I don't think I could move them, they were too heavy.

MR. WAGMAN: Objection. I don't think her opinion in this matter is relevant, because she hasn't tried it.

THE COURT: Well, this is a question directed to her, individu-

ally, so I will overrule the objection.

BY MR. WILKES:

Q. Would you proceed to answer that? A. I don't think I could.

21 MR. WILKES: Would Your Honor indulge me just a moment, please?

* * * *

MR. WILKES: Your Honor please, I would like to offer in evidence at this time, as just one exhibit number which would be marked for identification Plaintiffs' Exhibit No. 24, six sheets of photographs which were in this case in connection with the motions for temporary restraining order and preliminary injunction.

* * * *

22 MR. WILKES: If Your Honor please, I would like to refer to Plaintiffs' Exhibit No. 24, the first sheet being the Folger Apartment, the white building in the center; the photograph below being taken from Second Street looking westward on North Carolina Avenue showing the properties, the row houses which belong to the Plaintiffs Horton, Schreiber, Connor, Connor and Grigsby; on the second sheet, for the purpose of showing the property of the defendants Ishee; on the third sheet, for the purpose of showing a photograph from the right of way looking toward the apartment house at the chicken wire fence which was placed by the defendant Ishee, which will be connected up, across the gate immediately prior to the temporary restraining order, across the gate to the apartment house, for the purpose of showing at the lower photograph on the page, the new fence which has been erected by the defendant Gruis, and looking westward across the right of way area, with the fences on the left and straight ahead, which were erected by the defendant Ishees, and looking beyond that down the public alley towards the stores on First Street; and showing the area within the rear yard of plaintiff Gruis' property and the gate leading to the right of way with the chicken wire strung across it. And on the top of the next sheet, a view from the public alley looking eastward toward the apartment house showing the fence, fencing, gates, what have you, and the garages which are constructed upon the properties of plaintiffs Grigsby, Connor and Connor, for the purpose of showing the setback of the

garages south of the right of way which, together with the right of way area, has served as ample maneuvering space to either of the garages located upon three of the properties of plaintiffs; a view taken from the second or third floor porch of the Folger Apartment house looking westward along the right of way and down past the public alley, showing the obstructions which are complained of in this proceedings.

* * * *

CROSS-EXAMINATION

BY MR. WAGMAN:

Q. Mrs. Grigsby, directing your attention to the barricades, the gates that were put up by the Ishees in August of 1962, did they in any way enclose any part of your garage door? A. At first they put up a post halfway between -- mine is a double garage -- halfway between the two, which would mean I could not use the second half of the garage, but later they took that post down.

Q. How much later? A. The next day, maybe.

Q. Wasn't it that same afternoon? A. I wouldn't know. I didn't spend the afternoon in the alley, so I wouldn't know, but it was gone.

Q. But the gates which enclosed, which cut across the west end of the right of way, did not in any way block or cross your garage, when they were finally erected, is that correct? A. That is right.

Q. Is your garage in use? A. Yes, it is.

Q. Who uses it? A. My cousin.

Q. What is his name? A. Hugh Curley Boswell.

Q. How long has he been using your garage? A. I can't remember the number of years, quite long.

Q. And he was able to use the garage after these gates were erected, was he not? A. I don't know that he has been in the garage that recently.

Q. In the past year? A. Yes.

Q. But if he wanted to use it, he was able to, as far as you know? A. As far as I can visualize it, he could.

Q. Now, if I am not mistaken, you have lived in this building now since about 1913, is that correct, on and off? A. Since when?

Q. 1913. A. 1913.

Q. Yes. And you left in 1919 to get married, is that correct? A. That is right.

25 Q. And you made, I believe you say you returned once or twice a year for visits of quite lengthy duration? A. Right.

Q. All during the time until 1937. Now, when did you say those garages were built? A. 1924.

Q. Prior to 1924, will you describe the rear of your property and the rear of Lot 848 as to the type of fences, if any, that it had? A. There was no alley then, that's all I can say.

Q. Isn't it a fact that along the rear line of your property and extending across the rear line of the properties belonging to Connors and Schreiber, and so on, now that there was a fence? A. There was a fence.

Q. A large fence? A. Yes.

Q. Would you say that fence was about eight feet in height, if you recall? A. It was six feet.

Q. And there were no openings in that fence, is that correct? A. Not that I know of. We had one in ours, because we had it opened on the alley there.

26 Q. Yes, but that was at the corner of the fence, which opened on the alley which abutted your property right here, is that correct?

A. Yes.

Q. Now, to your recollection, was there a fence to the rear of the apartment house, between Lot 848 and the apartment? A. Yes.

Q. Was that also a solid fence? A. Yes.

Q. Was there a fence on the west end of Lot 848, if you recall? A. I wouldn't know that.

Q. Do you know who owned the property in Lot 848 in 1924? A. Is that the lot -- I don't know about numbers.

Q. Well, the Ishee house, 149 D Street. A. Did I know who owned it in 1924?

Q. Yes. A. No.

Q. Do you know what kind of a building it was at that time? A. Same as is there now.

Q. What was it used for at that time, if you recall? A. One time it was a two-family house; another time it was three or four apartments.

Q. Do you know when it became three or four apartments? A. No, I don't.

Q. Does the name Lee Walsky mean anything to you? A. I never heard it until the case came up.

Q. If I told you Lee Walsky owned that building in 1924, would you know whether that was correct or not? A. No.

Q. When those three garages were built, was that six-foot fence taken down, to your knowledge, the six-foot fence at the rear end of the property? A. We had an alley there, concreted, when the garages were built.

Q. When the garages were built. Were there any other fences erected at that time, to your knowledge? A. Not to my knowledge.

Q. Was there a fence put up at the end of this, at the north end of this right of way, if you recall? A. Across that D Street property, yes.

Q. There was a fence put up. Do you know who put that up? A. No, I don't.

Q. Do you know who took down the fence at the rear of this property? A. Mr. Ishee did.

Q. Back in 1924? A. Oh, I don't know about that.

Q. You don't know who took down the fence? A. No, not in 1924.

Q. Now, you testified that there was a gate in the fence leading from the Folger Apartment, the property then occupied by Mr. and Mrs. McCray and their daughter Harriet and their tenants, there was a gate put into this fence, is that correct? A. Yes.

Q. When was that gate put in? A. I couldn't say when it was put there. It wouldn't be any sense in having it there until the alley was opened up.

THE COURT: When was the alley opened up?

THE WITNESS: When the garages were built, 1924.

BY MR. WAGMAN:

Q. And how high was that fence between the Folger Apartment and the property that is now owned by the Ishees, do you recall? A. I imagine a six-foot wooden fence, it wasn't extra high but it wasn't low.

Q. Now, you knew Harriet McCray very well, did you not? A.

I did.

Q. Where does she live now? A. She passed away last fall.

Q. Last fall. When those garages were built, your parents rented the garage in the rear of your property to Mr. McCray and his daughter Harriet, is that correct? A. Yes.

29 Q. Up until that time, do you know how the Folger Apartment received any of its services? A. They had a basement at that time, there were no apartments in the basement and their trash went out the front cellar door.

Q. Now, is it not a fact that when your parents -- by the way, what kind of a man was Mr. McCray? A. In what way?

Q. Was he a man -- describe him, please, as to the type of man he was. A. Well, I might be very partial because I was very fond of him. He was a big man, rather stern.

Q. Was he the kind of a man who would do an illegal act? A. No, he would not.

Q. Was the the kind of a man who would trespass on another person's property? A. I don't believe --

MR. WILKES: I object to all this characterization, if Your Honor please, was he the kind of a man who would trespass on somebody else's property?

THE COURT: I sustain the objection to that question.

BY MR. WAGMAN:

Q. Was he the kind of man who would put a hole in a gate -- in a fence without permission to do so?

MR. WILKES: I object to the characterization as to whether he was the kind of a man who would do so.

30 THE COURT: I don't think it would be a bit helpful to know what kind of a man she thought he was.

* * * *

BY MR. WAGMAN:

Q. Did Mr. McCray have permission from your father to use the garage? A. He rented it and paid for it.

Q. Then he had permission to go across the rear, to use it from the rear, did he not, across the alley? A. Well, he just did, it is the only way he could get in his house.

Q. The only way would be through that? A. Yes.

Q. Do you know whether or not he asked Mr. Walsky for permission to cut a gate in his fence?

THE COURT: Mr. Who?

MR. WAGMAN: Walsky, the owner of the property.

THE WITNESS: It wasn't in Mr. Walsky's fence, it was in his own fence.

BY MR. WAGMAN:

Q. Wasn't this a fence that separated the property between Lot 848 and the Folger Apartment? A. There was a fence across the back of the Folger Apartment.

Q. Yes, Now, did Mr. McCray have access to the back yard?

31 A. It was an alley when he put the gate in there.

Q. In other words, it was after that, when he put the gate in. Do you know from whom, if anyone, he received permission to put that gate in? A. I don't know that.

Q. You don't know that. Did he have the permission of your father to put the gate in? A. I wouldn't know.

Q. You wouldn't. A. I wasn't living at home at that time.

Q. Do you know who had the alley paved with concrete? A. I really do not, no.

Q. When you returned in 1937 to this property, what changes, if any, had been made in the Folger Apartment, if you know. A. It had been made into small apartments; originally, it was only six - six-room apartments, and it had been cut up into many small apartments.

Q. Do you know when that had been done? A. What?

Q. Do you know when that change was made in the apartment?

A. When Father McCray sold it, after he sold it.

Q. And that was, then, in 1937, between the time he sold it and the time you returned, that these alterations were made in the Folger Apartment, is that correct? A. I returned in 1937 and it was about that time that Father McCray sold the apartment, so it was after '37 that the small apartments were made.

Q. In 1937 then, or about that time, how were the services supplied to the Folger Apartment? A. All through the back, because they made apartments in the basement.

Q. When was that? A. When they made it, fixed it over.

Q. That was after Father McCray sold it, is that correct?

A. Yes.

Q. But prior to his selling it, the services still came in through the front, did they not? A. Yes.

Q. Your garage is set back from the rear line of your property, isn't it? A. A few feet, I believe.

Q. Do you know how many feet it is? A. No.

Q. If I were to say it is ten feet, would you say that is correct? Well, that picture looks right.

Q. Do you know why the garages were set back from the property line? Well, I always heard we had to set ours back so that the 33 cousins could get into their garages.

Q. Isn't it a fact that even back in 1924, with the much smaller cars that were available then, a car could not get into one of these garages unless there had been the set back? A. Well, I suppose that is why they set them back.

Q. Now, this was done with the approval of all the parties involved in this alley, and the right of way and the erection of the garage, is that correct? A. I suppose so.

Q. In effect, then, is it not true that up until August of 1962, when these gates were erected by Mr. and Mrs. Ishee, and since the gates have been taken down, that this right of way is in effect approximately twenty feet wide, as wide as the alley is right about here? A. It is wider than it was originally.

Q. You say it is wider than it was originally? A. Yes, they could go up there and turn around in some way or other with the small cars, but they can't do it now.

MR. WAGMAN: Will the Court indulge me for one moment, please?

THE COURT: Certainly.

BY MR. WAGMAN:

Q. By the way, Mrs. Grigsby, Daniel Allman, Sr., your great uncle, never did own the property you now own, is that correct?

34 A. No.

THE COURT: You say no, it is not correct?

THE WITNESS: Huh?

THE COURT: You mean he did not own it?

THE WITNESS: Not the property that I own today, no.

BY MR. WAGMAN:

Q. Then Lot 800 was never a part of the partition suit that followed the death of Mr. Allman, Sr., is that correct? A. No.

Q. It was not a part? A. No.

* * * *

Q. Lot 800 was not a part of the partition suit, is that correct? A. I am not sure I understand what you mean.

Q. Daniel Allman, Sr., had no interest in Lot 800, is that correct? A. He had no interest in our lot, no.

Q. Your lot. And your lot was never a part of the partition suit brought in this court by the trustees of Mr. Allman's estate?

A. No.

Q. Have you had occasion to observe that right of way for its full length, from time to time, since 1937 to the present? A. You mean how it was used?

Q. Yes. A. Why, certainly, I have been living there.

Q. Did you ever see any debris in the right of way, any trash?

MR. WILKES: Your Honor please, I will object to that question. There is no issue in this case with respect to debris, there is no claim for damages for debris, and if this case gets into a question as to who threw trash where, we are going to be here six months trying something that is involved in a police court type of an action.

THE COURT: What is the purpose of the inquiry?

MR. WAGMAN: Merely to show, Your Honor, that there was an abuse of the right of way by persons unknown and that this led up to the putting in the gate, it is for that particular purpose.

THE COURT: Let's assume for the sake of argument that there is an abuse. Wouldn't the remedy be to correct the abuse, rather than something else?

MR. WAGMAN: If the abuse can be corrected, Your Honor. One way of correcting it is by putting up the gate.

MR. WILKES: Your Honor please, an easement, as created by the deed which is in evidence as our Exhibit No. 2, I believe--

THE COURT: I will sustain the objection to the question

about the trash being in the alley.

BY MR. WAGMAN:

Q. Do you know how your right to use that right of way or the alley was obtained? A. I do not.

Q. Do you know what consideration, if any, was paid by your parents for the right to use the alley? A. Well, I am sure they wouldn't have built a garage that they couldn't use, so they must have been sure of having the alley before they built the garage.

Q. Mrs. Grigsby, did you have occasion to move the gates that were put up by the Ishees in August of 1962? A. Did I?

Q. Yes. A. No.

Q. Did you ever have occasion to see anyone else move them?

A. No.

* * * *

37 Q. Were those gates fastened, to your knowledge? A. It had some sort of a board that went down, to lock them.

Q. And how was that board in the gate, do you recall? A. I wouldn't know.

Q. Was that board movable from either side of the gate? A. I wouldn't know, I never used it.

* * * *

REDIRECT EXAMINATION

BY MR. WILKES:

Q. Now, Mrs. Grigsby, you say in 1924, the garages were constructed and Mr. McCray started coming out through this way, is that correct? A. Yes.

Q. And you say that with respect to that setback of the garages, you said in response to one of counsel for the defendants' questions that you presumed that there must have been some discussions among the parties? A. Yes.

38 Q. To your knowledge, was there ever any discussion with the owners of the property now owned by Ishee, known as Lot 848, in connection with permission to use the right of way area? A. I don't know anything about it.

Q. Now, the fences which were erected, in accordance with your testimony, in August of 1962, were along the west side of this yellow

area, is that correct? A. Yes.

Q. Generally along the west side and then they extended generally along your north property lines of the North Carolina houses over toward the direction and up to Schreiber, is that correct? A. Yes.

Q. Now, just a small portion of that fence was to the west of your east property line, is that correct? A. Yes.

Q. Now, in the event that the Ishees should erect any obstruction similar to those which they erected in August 1962, along the west line of property that they acquired July 30, 1963, being this Lot 849, that would extend over halfway, approximately, across the face of your garage, is that correct? A. Yes.

* * * *

39 RECROSS-EXAMINATION

BY MR. WAGMAN:

Q. Directing your attention to photographs 21, 22 and 23, Plaintiffs' Exhibits Nos. 21, 22 and 23, do you know who took these photographs? A. My cousin took them.

Q. Isn't it a fact those photographs were taken by Mr. and Mrs. Ishee? A. They were not, here I am in the picture right here, watching her take the picture.

Q. Isn't it a fact that these are the pictures that were taken by your cousin? A. Well, she took more than three.

Q. Well, there are four there. A. I know she took that one, because I am in it.

Q. Yes, and this is number 20, which was taken by your cousin. A. As far as I know, she took these.

Q. Now, you don't know who took these, then, do you, No. 21, 22 and 23? A. I told you my cousin took these.

Q. Are you positive? A. Yes.

Q. Were they all taken at the same time? A. The same day.

Q. They were taken the same day? A. No, I think she came back the next day and took some more.

* * * *

40 REDIRECT EXAMINATION

BY MR. WILKES:

Q. Are Exhibits - are photograph exhibits 21, 22 and 23, in

your opinion, fair representations of what they purport to show?

A. I certainly do.

* * * *

JAMES D. WENTZ, JR.

called as a witness by the plaintiffs, being first duly sworn, was examined and testified as follows:

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DIRECT EXAMINATION

BY MR. WILKES:

Q. State your full name, please, sir. A. James D. Wentz, W-e-n-t-z, Jr. I am an investigator with the Department of Licenses and Inspections, District Government.

Q. And you are here today in response to a subpoena served upon Mr. J. J. Ilgenfritz, who is in charge of the Department of Licenses and Inspections of the District of Columbia Government? A. I am.

Q. Do you have any records with you, of the District of Columbia? A. I do.

Q. Are they records that are kept in the regular course of business? A. They are.

Q. Would you refer to those records and tell me, please, if you have any information in connection with the date of construction of garages at 160 North Carolina Avenue, which is now known as Lot 800?

A. I have such a record, yes.

Q. What was the date of construction, please, sir, the date of issuance of the building permit? It is 160 North Carolina Avenue.

42 A. The date is July 24, 1924.

Q. Now, do you have any record of a permit being obtained to construct a garage at the rear of 170 and 172 North Carolina Avenue?

A. I do, yes.

Q. What are the dates of issuance of those permits? A. July 24, 1924.

Q. With respect to both 170 and 172? A. The best I can see from this record is 170, I am sorry, and 162.

Q. There is no 162, the numbers jump from 160 to 170, two row houses which abut one another. A. This thing would be 170 and 172.

THE COURT: That first date that you gave with reference to 160 North Carolina Avenue, you said July 24, 1924 or 1944?

THE WITNESS: 1924.

BY MR. WILKES:

Q. Now, do you have in your records any evidence of a building permit for the construction of an apartment house at 409 or 411 Second Street, S.E.? A. I have in my records a permit for a building, 411 Second Street, S.E.

Q. What is the date of that permit that was issued? A. April 27, 1905.

Q. April what? A. 27, 1905. I might say this, this is possibly the date of the application, it was issued on May 12, 1905.

MR. WILKES: No further questions, sir.

CROSS-EXAMINATION

BY MR. WAGMAN:

Q. Excuse me, Mr. Wentz, do you have the records of all alterations and changes made to this apartment house from 1903 until the present with you? A. Yes, I do.

Q. Will you give us, was there a permit for the construction or the placing of a gate in a fence in 1924 or 1925 that you know of?

A. This is on which building that you are speaking of now?

Q. 411 Second Street? A. I do not find it in my records, no.

Q. Is there a record for the erection of a fence in the rear of 411 Second Street any time between 1903 and 1924 or '25? A. I do not see one.

Q. Was there a permit for alterations to the building, 411 Second Street, S.E., taken out in 1937? A. 1937, no, I do not have anything here for 1937.

Q. No records at all for 1937? A. Not in 1937, no.

Q. Do you have a permit showing alterations to that building in 1948? A. No.

Q. Do you have a permit showing any alterations or permission to make alterations to the Folger Apartment at 411 Second Street, S.E., between the period 1937 and 1948? A. No.

THE COURT: How long do you all keep your records for alterations to a place?

THE WITNESS: Well, I actually have records here that go back to 18--what is the date on this, the record I have here even goes back to 1905, so that would cover that period that he is discussing.

BY MR. WAGMAN:

Q. Do you have a permit in there for any alterations or any remodeling of said premises in 1962 and 1963? A. We are still speaking of 411?

Q. 411 Second Street, S.E. A. I have not.

Q. Do you have a permit for the erection of a fence and the placing of a gate therein at the rear of said premises 411 Second Street, S.E., for any time in 1963? A. No, I have not.

* * * *

LYDIA MEADERS

47

was called as a witness for the plaintiffs and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WILKES:

Q. Would you state your full name, please? A. Lydia M. Meaders.

Q. And where do you reside? A. 3928 - 17th Street, Northeast.

Q. Now, you appear here today in response to a subpoena served upon you? A. I do.

Q. Are you the same Lydia Meaders who is the wife of May Meaders? A. I am.

Q. And are you and your husband, May Meaders, the same persons who took title to the property now owned by Ishee, located at 149 D Street, Southeast? A. Yes.

Q. By deed dated August 3, 1945? A. That is right.

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Q. And are you the same Lydia Meaders who, together with her husband, on November 30, 1951, sold and conveyed 149 D Street, Southeast, to Tommy C. and Maryclaire Ishee? A. That's right.

Q. Now, Mrs. Meaders, when you purchased 149 D Street, Southeast, on August 3, 1945, did you and your husband move into the premises and live there? A. Yes, we did.

Q. And did you live there until you sold it to the Ishees in 1951? A. Well, we moved approximately five or six months, something like that, before we sold the property.

Q. I see. You moved five or six months before you sold it to Ishee in November 30, 1951? A. That is right.

Q. I see. Now, when you moved into 149 D Street, Southeast, on or about August 3, 1945, what was at the rear of your property in the area generally marked in yellow? Let me direct your attention to the blue line, which is your rear property line, the area which has been colored in yellow here is the rear 12 feet of that lot. Was there any paving at that location? A. Yes, there was.

Q. What was it paved with? A. Well--

THE COURT: Keep your voice up, please.

THE WITNESS: I guess, well, it was just a hard cement, I would suppose.

BY MR. WILKES:

Q. Cement. A. You would call it.

Q. And when you moved into 149 D Street, Southeast, on or about August 3, 1945, was there an opening in the fence that led from this yellow area to the apartment house that fronted on 2nd Street known as the Folger Apartments? A. Yes, there was.

Q. And did tenants of the apartment house use that gate as a means of getting to the area in yellow? A. Yes, they did.

Q. And for passing down the public alley? A. Yes.

Q. Were there any stores down here on 1st Street? A. Yes, there was. I can't remember what type of store. I can't remember just what type of store now, but there was some stores down there.

Q. I see. And were trash and garbage collections made up along through the yellow area from the apartment house known as the Folger Apartments when you moved there? A. Yes.

Q. And did that continue during the period of time that you lived there? A. Yes, it did.

Q. And the tenants coming in and out, did that continue during the time that you lived there? A. Yes, it did.

Q. Now, to the north towards D Street from the yellow area, in other words, between the back of your house and the right of way area colored in yellow, was there any fence that was along that line? A. Yes, there was. There was a wooden fence there.

Q. I see. Now, the evidence in this case shows that during the time you owned this premises when you purchased it David and Ida Bernstein were the owners of the Folger Apartments located at 409-411 2nd Street. Did you ever discuss with David or Ida Bernstein

any of the use of the area in yellow that is referred to as a right of way? A. Well, no, I didn't. At that time my husband was in good health and he took care of everything. So I don't think he did. I am not saying what I know, but I don't think he did, because he never mentioned it to me.

Q. Is your husband in such state of health that he would be in a position to come to court and testify in this case today? A. No, 51 he isn't.

Q. And when -- did that condition arise before or after you sold 149 D Street to Ishee? A. Since. It just arrived this year.

Q. I see. Now, during the period of time when you owned and lived at 149 D Street, was this area in yellow also used by the people fronting on North Carolina Avenue who are marked on this plat Connor and Connor and have two garages located along there? A. Well, yes, the people on North Carolina Avenue had garages back there; and they used the right of way, I mean, that alley back there; but I don't know their names.

Q. I see. And was trash collected there also with respect to the houses that were located along this strip that is called Horton, Schreiber, Connor and Connor? A. Well, I guess so. I don't know, because the trashmen were back in there. Now, as to who put their trash out there, I couldn't tell you, because I was working and I don't know.

Q. I see. A. But I do know it was used publicly.

THE COURT: You are saying that you saw trash collectors in that area, but you don't know whose trash they were collecting, is that right?

52 THE WITNESS: That is right, because I put mine out there, too.

BY MR. WILKES:

Q. Yes. And that was all during the period that you lived there, is that correct? A. Yes.

THE COURT: That fence that you spoke of, that was a fence in the back area of your property?

THE WITNESS: Yes, it was.

THE COURT: And it did not extend over the yellow part?

THE WITNESS: No, it didn't. In other words, it was be-

tween -- I mean, it seemingly separated the alleyway from the yard. It was just, you know, between the alley and the yard.

THE COURT: Yes. You may proceed, Mr. Wilkes.

MR. WILKES: No further questions, if Your Honor please.

CROSS EXAMINATION

BY MR. WAGMAN:

Q. Mrs. Meaders, now, that fence that you talked about, that was the fence on the north line of the right of way, is that correct? A. Yes.

Q. And that fence was standing when you purchased the property, was it not? A. Yes, it was.

Q. Did you know to whom that right of way belonged, the yellow strip belonged when you purchased the property? A. Yes, we were told it was ours.

Q. You were told it was yours? A. Yes.

Q. And that is the way you found it and that is the way you left it, is that correct? A. That is right.

Q. And that is the way it remained all during the years you owned it? A. That is right.

Q. Now, to your knowledge, who used that rear 12 feet, the right of way? A. Well, the people from North Carolina Avenue, garages back in there, of course, they used it, and the people on Second Street, that apartment house. And, of course, I used it, too, you know, going in and out.

Q. It was wide open, was it not? A. Yes, it was.

Q. And anybody who wanted to come up in there could do it? A. Yes.

Q. Could you tell the difference between the right of way and the alley by looking at it? Could you tell where the alley ended and the right of way began? A. Well, no, I couldn't. I don't get you.

THE COURT: You say you don't understand the question?

THE WITNESS: No. What does he mean by where the alley begins?

THE COURT: Now, there was a long alley, there, wasn't it, that led clear out to a street?

THE WITNESS: Oh, yes.

BY MR. WAGMAN:

Q. Could you tell where the right of way left off and the alley began or did it all look the same? A. Well, it all looked practically the same.

Q. And how wide was that right of way back of your house, if you recall? A. Oh, I wish you wouldn't ask me that, because I couldn't tell you just exactly. As a matter of fact, I just don't know. I couldn't say exactly.

Q. Now, you said the tenants of the apartment house used that right of way? A. Yes.

Q. What did they use it for? A. Well, there was their trash, and I think they carried oil in that way or something, whatever they heated the building with.

Q. Did you ever see parked cars out there? A. Yes, indeed.

Q. They used to park their cars on the right of way? A. Somebody would park back in there sometimes, yes.

Q. Was it quite frequent or was it just occasionally? Well, quite frequent.

Q. Were the garages used for parking, to the best of your recollection? A. Well, I think so. As far as I can remember, it seemed like somebody used the garage for parking. Now, to say who, I couldn't.

* * * *

ANN SCHREIBER

one of the plaintiffs, was called as a witness for the plaintiffs and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WILKES:

Q. State your full name, please. A. Ann Schreiber. S-c-h-r-e-i-b-e-r.

Q. And where do you reside, please? A. 174 North Carolina Avenue, Southeast.

Q. And is that the property which is marked Schreiber on Plaintiffs' Exhibit No. 1? A. Yes, it is.

Q. And where are you employed? A. I am an administrative assistant to Congressman John Baldwin.

Q. Approximately when did you purchase that premises? A.

It was approximately the end of July 1961. However, I did not move in at that time.

Q. When did you move in? A. December 15th, 1961.

Q. And have you resided at that location since that time?

A. Yes, I have.

Q. Are you married or unmarried? A. Unmarried.

Q. And you reside there as your home, you make this as your home, is that correct? A. Yes.

Q. During the period of your residence at 174 North Carolina Avenue, Southeast, up to certain actions of defendants Ishee in August of 1962, up until that time, can you tell me what use, if any, you made of the subject right of way? A. Well, it was used for picking up of my trash, of course; the workmen used it for delivering all of these items, I had a complete renovation of my house.

* * *

THE WITNESS: Many, many building materials were brought through the back in the renovation of my house. The workmen used it a great deal.

BY MR. WILKES:

Q. Did you use it for a pedestrian passage at all yourself? A. Yes, I used it solely for my wife in getting to work, I walked to work, and I used it every day, every morning and night, including Saturdays.

Q. You would pass out through the right of way area and down the public alley and thence to the Capitol, is that correct? A. That is right.

Q. And you would return home by that same route, is that correct? A. Yes, that was daily with very few exceptions.

Q. Now, have you mentioned trash collection. That is by a trash truck, is it? A. Yes.

Q. Trash collection truck? A. Yes.

Q. Is your garbage also so collected? A. Well, I have a disposal. So I did not have the garbage problem.

Q. I see. Very well. Now, directing your attention to the time on or about August 1962, and you have occasion to observe the erection of anything by the defendants Ishee? A. Yes. I left one morning and the workmen were putting up the posts; and when I returned ... I don't know whether it was completed that same day, but it certainly was the

next day when I returned from work.

59 Q. Did you consent to the erection of those items which were constructed at the direction of the defendants Ishee? A. No, I mean, I wasn't asked.

Q. Did you then proceed to employ counsel for the purpose of the elimination of that which had been constructed by the defendants?

A. Yes.

Q. And when was that? A. Oh, a week to ten days after it was erected.

Q. Then you were a party to the application for a temporary restraining order which was issued by Judge Pine on May 20, 1963, is that correct? A. That is right.

Q. And to the preliminary injunction that was issued by Judge Youngdahl on June 6, 1963? A. Yes.

Q. In addition to the posts and fencing which were erected along the west end of the right of way and then eastwardly along the north property lines of the North Carolina Avenue property, did you personally observe at any time during the period of time when the fence was up from August of 1962 until the temporary restraining order of May 20, 1963, any automobiles of the defendants parked within the right of way area? A. Yes, the Ishees station wagon.

60 Q. And how frequent was that? A. Well, to my knowledge, at this time, it was almost daily. I would say almost daily, constantly.

Q. And you said you walked in and out of the public alley to your house each day you went to work? A. That is correct.

Q. And how many days a week do you work? A. Five and a half days a week.

Q. So you go in and out six days a week? A. Right.

Q. With the exception of such days as you may not work, is that correct? A. That is correct.

Q. Are you a part-time or a fulltime employee? A. Full time.

Q. At the one location, United States Capitol? A. Right.

Q. I see. When the stationwagon of Mr. Ishee was observed parked there, was it parked momentarily or, to your observation, was it parked there over extended periods of time? A. I would say extended periods of time. Possibly, on the weekends, it was gone more frequently than during the week. I would say, however, it was almost every night.

Q. The boards, fences, and fencing which were involved in this situation, were these of a type and character which would be freely useable by you as gates or was this something of such type and character by reason of size and weight it would be an impediment in so far as your use is concerned? A. I tried on three or four occasions to open these gates, and it was absolutely impossible for me to open them.

MR. WILKES: No further questions.

CROSS EXAMINATION

BY MR. WAGMAN:

Q. Miss Schreiber, you said you did a complete renovation of your property, is that correct? A. That is correct.

Q. Now, is there a garage on there now? A. No.

Q. There isn't? A. No.

Q. How is the rear end of your property enclosed? A. Fence.

Q. How high is that fence? A. Oh, I think possibly six feet.

Q. Six feet. Now, is that fence on the rear property line, to the best of your knowledge? A. No, I have learned that the contractor might have made an error on that fence.

Q. And where is that fence standing now? A. The back of my lot, it is possible it is not exactly on the lot.

Q. Then it is possible that it is on the right of way, is it not? A. Possible.

Q. On the property of the defendant? A. On the right of way.

Q. And isn't the right of way the property of the defendant? Answer the question yes or no. A. The right of way doesn't belong to anyone.

Q. Oh, it doesn't belong to anyone? A. It is for the use of the people there.

Q. Who owns that ground on which the right of way along which the right of way exists --

MR. WILKES: If Your Honor please, this is a matter of record. We have alleged in our complaint that the subject Lot 848, the record title to it is vested in Ishee, subject to the right of way for the benefit of the plaintiffs in this case.

THE COURT: Yes, I am aware of that.

MR. WILKES: I don't think this is proper cross examination.

MR. WAGMAN: It is proper, Your Honor, in the sense that it shows the attitude of the plaintiffs in this action, and it shows what they really believe and how they feel, which has given rise to all the difficulty here.

THE WITNESS: Well, I might add that my deed, I have a title to my property which shows a right of way; and that is why I quote it as such. I got this title in July 1961 which gives me a clear title to my house with a 12-foot right of way which is on the deed; and that is what I understand.

BY MR. WAGMAN:

Q. I only asked you, Do you know who owns the ground on which the right of way exists? A. I don't assume that it is owned by anyone. It is used on an adverse possession basis.

Q. Now, you have an opening in that fence that you had erected? A. Yes.

Q. How large an opening is it? A. Well, it is a gate.

Q. And about how wide is the gate? A. Oh, eight feet maybe.

Q. Is it eight feet wide? A. Oh, it is possibly less than that, four feet, maybe five.

Q. Is the gate on the rear fence? A. Yes, it is.

Q. Or is it along the right of way, you say? A. Well, it is just out. The fence is not flush, that is, from the garage to the next property. It is just out. This is the suggestion of my contractor.

Q. This is your property right here (indicating), is that correct? A. Right.

Q. Now, your fence extends along this blue line or a bit beyond it, is that correct? A. Yes, but, as I say, it is jutted out close to the Connors' property.

Q. Then there is-- A. It juts out a little and then it slants back to Mrs. Horton.

Q. There is then a fence that extends along this black line up to the garage from the end part of the fence to the garage? A. Yes.

Q. Now, where is the gate? Is the gate in the part of the fence which extends to the north line of your property or on the west line? A. It goes out.

Q. Where? A. West.

Q. It is on the west-- A. No, it goes out north. Are you saying that?

Q. Does it open up directly on to the right of way or does it open up to the side? A. It opens up to Mrs. Connor's property.

Q. It opens up on to this open space right here, is that correct? A. Yes.

Q. Therefore, it does not open up on to the right of way? A. No, well, no, it opens up to Mrs. Connor's property.

I might add here, too, that I didn't know these things, I knew nothing about this type of thing. I put the entire renovation in the hands of the contractor. He suggested this way of putting this fence up. If it is incorrect, I am sorry. I would have to move it. But I was at the mercy of the contractor. I took his suggestion.

Q. Now, Mrs. Schreiber, or Miss Schreiber, when you open this gate, can you walk directly across here (indicating) on to the alley? A. Yes.

Q. Directing your attention to the period of time during which these gates were up, is it not a fact that during that period of time you could open this gate right here (indicating) and walk straight on through without having to go through any of the gates on to the alley right of way, on to the alley, isn't that correct? A. There was a walking area there, strictly walking.

Q. Just walking? A. Yes.

Q. So that you didn't have to go through any of the gates to get to the alley on your way to and from work, is that correct? A. Yes, in walking, no.

Q. Do you own an automobile? A. No.

Q. Have you ever had occasion to drive into the rear of that alley? A. No.

Q. Did you ever have occasion to have friends drive into the rear? A. No, but things being delivered or hoping to be delivered and they were stopped by the fence, of course.

Q. Have you ever had friends visit you who have left their cars in the rear, in the right of way? A. No, I have not.

Q. Do you have a friend by the name of Harmon? A. No.

Q. Do you know anybody who owns a Fairlane sedan? A. No.

Q. Now, you say that you had observed the Ishee station wagon parked in the right of way for extended periods of time almost daily

during the period when the gates were up, is that correct? A. Well, it wasn't in the center. It was off center towards their property.

Q. Towards their property. How far off center, would you say? A. I would say it was half on the right of way.

Q. Did you ever measure it? A. No.

Q. Did you ever stop to measure twelve feet? A. Well, I think observing it would be close enough.

Q. Could you tell us how far twelve feet is? Would you show us a twelve-foot distance now? A. Where do you suggest?

68 Q. Wherever you can. How far would you say the distance is from you to me? A. Oh, approximately twelve feet.

Q. Now, when you say the Ishee wagon was parked off partly on their property and partly on the right of way, is that correct? A. Right.

Q. But you never measured it? A. No.

Q. Is it possible you may have been in error as to the distance involved? A. I don't think so. I have had several people corroborate it.

Q. Just answer what you saw and what you believe. A. I don't think I am wrong.

Q. Now, where was it parked when you saw it? In what part of the right of way was it going from east to west? A. Well, I would say very close in line with my property.

Q. In other words, towards Second Street, is that correct?

A. Yes.

Q. Now, do you know how far your fence goes over the line on to the right of way? A. No, I do not.

69 Q. Did you take that into consideration when you measured the twelve feet? A. No, because my fence slants, and I took that into consideration.

Q. Now, is there a telephone pole back of the property off the right of way, do you recall? A. I think there is some sort of pole.

Q. Do you know how far it is from your fence, how far north? A. No, because I haven't specifically noted where that pole is. I just recall one there.

Q. When you put out your trash, where do you put it? A. Be-

fore or after the fence?

Q. Well, before and after. A. Around by my fence.

Q. On the rear? A. On the rear.

Q. You put it on the right of way? A. Right.

Q. Have you ever put anything else besides trash on the right of way? A. I presume you mean a stump that was taken out of my property?

Q. I am asking you to answer the question. A. There was one there for some length of time.

Q. How long a period of time was it there? A. Well, this renovation thing was so upsetting to me and I had so many problems with it that it was there for some months, probably from July or August in '61 until the following spring.

THE COURT: When you speak of a stump, are you speaking of a stump that is in the ground or one that is detached from the ground?

THE WITNESS: Detached, Your Honor. It was taken out of my yard when this renovation was being done. It was part of the work.

BY MR. WAGMAN:

Q. Now, who finally removed the stump? A. I finally got a friend and a workman to remove it. I made several attempts, I might add, arranging for men to come. Some showed up, some didn't. Some wanted too much money, and some said it would take four men. Some said they couldn't do it by themselves. I made at least six attempts over that period to have that stump removed. I live alone. I have to make all these arrangements, which I found very difficult on that score; and I am sorry it was delayed; but I had many, many problems with that renovation.

Q. How large a stump was it? A. It was a good size. One man could not lift it, which created the problem for me. I had to find several men. Some were exorbitant in their prices also.

Q. Now, what did you do with the wood that came off the tree which resulted in the stump? A. It was stacked in back of my fence.

Q. In back of your fence? A. Yes.

Q. Then it was stacked on the right of way, was it not? A. Presumably now, yes. As I say, when I made all these things I did

not know.

Q. How long was it stacked on the right of way? A. Well, it was through the winter. I guess that winter of '61.

* * * *

Q. When did you move into the house? A. December 15, 1961. I think the last of the wood was used in March.

Q. Of what year? A. Of '62.

Q. March of '62? A. Yes.

Q. For what reason, if any, did you put it on the right of way? A. I just had to get it out of the way, and it was just for that reason. As I said, I didn't know what to do with half of these things. So I just got it out of the way, and it just stayed.

Q. Were you ever asked by the Ishees to remove the stump? A. I think on one occasion she made some comment.

Q. Were you ever asked to remove the cord wood? A. No.

* * * *

74 Q. When did you put your trash out into the right of way? A. Well, anywhere from late Sunday afternoon to Sunday night.

Q. And it is collected on Monday morning? A. Yes.

Q. Miss Schreiber, when you purchased the house, was there a fence on the property at the rear of it? A. It was a broken down semblance of a fence.

75 Q. If I were to say that your contractor or you moved that fence, put the new fence four feet beyond the line where the other fence stood, would you say that was right or wrong? A. I would say it was possible. I did not know at the time what was going on in the fence situation.

* * * *

REDIRECT EXAMINATION

BY MR. WILKES:

Q. At or about the time of the erection of the fence, fencing and gates by Ishees in August of 1962, did the Ishees remove some type of fence which was northerly of the right of way? A. Yes.

Q. If you know. A. They used that fence, I believe, to build this barricade, or a lot of the wood from it. They tore that down and used a great deal of the wood from it to build this barricade.

* * * *

6 Q. Now, I direct your attention to Plaintiffs' Exhibit No. 22 for identification, pardon me, in evidence, and ask you if this area across the property of Connor, Connor and Grigsby is the walking area to the alley just south of the right of way which you refer to within your gate in the background? A. That is right.

7 Q. Now, I show you Plaintiffs' Exhibit No. 21 in evidence and ask you if you recognize what it purports to show. A. It shows the fence and Mr. Ishee's car parked there.

8 Q. Now, you have testified on direct examination as to the parking of Mr. Ishee's car parking within the right of way area. A. Right.

9 Q. Is that the car to which you referred? A. Yes, it is.

Q. And is it or is it not generally in the location where you observed it as you went back and forth from work each day? A. Yes, it is.

Q. Now, during your period of residence, the trash had been picked up for Grigsby, Connor and Connor, Schreiber, Horton, and Gruis properties, is that correct? A. I believe the Gruis property has their own trash pick up, not the District.

Q. I see. A. To my knowledge, it is Connors, Grigsby, and Mrs. Horton.

MR. WILKES: No further questions.

RECORD EXAMINATION

BY MR. WAGMAN:

Q. Miss Schreiber, you have said there was a fence that was used by the Ishees to build these gates. Where did that fence come from? A. Well, they tore the one down that was along the property there and used many of the boards.

Q. Along which line? A. The top part of the yellow line.

Q. Are you sure it was along here? A. Yes.

Q. When was that torn down? A. Part of it fell down at one time.

Q. When? A. Prior to the building of the fence, half of it had fallen down. It was a very old fence, and they used part of the boards to build this.

Q. Are you sure it was along this yellow line? A. On this part of it (indicating). It was towards the apartment building. I

am positive of that.

Q. Towards the apartment building? A. Yes, and going past my property. It was a broken down fence.

Q. Now, are you saying that it was on the line of the right of way, the north line of way? A. I don't know what line it was on. It was a fence.

Q. It was a fence? A. Yes.

Q. Is it possible it was a number of feet in from the north line of the right of way? A. That is possible, yes.

Q. Did you ever observe any other cars parked in that right of way besides the Ishees? A. I think on occasion workmen.

79 Q. Isn't it a fact that workmen who worked in your house parked their cars there? A. Yes, when they were working on my house, but this was not used as a parking area.

Q. But isn't it a fact that they parked there for a full day at a time? A. During the day, possibly, if they had a big job. Some of them drove right into the yard while they were renovating my house. They had torn the back fence down to my property, and they drove right up into the yard, many of the workmen did, painters, and so forth.

* * * *

THE COURT: You say there was a fence that was torn down that bordered this right of way?

THE WITNESS: Yes, I am not positive, Your Honor, that it was on the right of way; but it did border their property, the Ishee property.

80 THE COURT: Well, now, after that fence was torn down, was there no fence between the Ishee property and the right of way?

THE WITNESS: That is correct.

THE COURT: None at all?

THE WITNESS: No. It was their complete property. They carried their property out to the barricade. In other words, their children played within the barricade and their yard extended to the barricade.

BY MR. WAGMAN:

Q. Before these gates were put up, did you have occasion to observe the back yard of the Ishees? A. Oh, of course.

Q. Now, how much of the back yard was fenced?

A. Well, just as we spoke, there was that broken down fence along their property.

Q. Now, isn't it a fact that there was a corner of their lot that was fenced off as a play yard for most of the time that you observed it? A. Well, there was a fence there in back of my property and the Connors. Now, I don't know how far over it went, but there was a broken down fence. I would say up to one of the Connor's property, I mean, in distance.

Q. In distance? A. Yes.

Q. Now, wasn't that fence quite a way off the right of way?

81 A. That is possible.

Q. Five, six, or eight feet? A. It is possible, but it was torn down, and it was completely a play yard for their children after the barricade was put up.

Q. You stated that you had occasion to move that barricade or to try to move some of the gates? A. I tried to open one of the gates so I could put my trash out on the right of way and could not open it on several occasions.

Q. Where did you put your trash after that? A. On Mrs. Connor's property, which is right in the garage opposite --

Q. Doesn't your gate open on to Mrs. Connor's property? A. Yes, and that is where I had to put my trash.

Q. Did you ever observe anyone else opening those gates?

A. No, I did not see anyone. Sometimes they were left swinging. They had been opened and just pushed together. I had observed that.

Q. Did you ever observe any children playing in the yard? A.

82 Oh, yes, frequently.

Q. Did you ever observe any of those children using those gates? A. Not opening them, no.

Q. Do you know how those gates work? A. I wish I had known. I could not open them.

Q. Well, can you describe the gate? A. Long crisscross pieces of wood, and they were put together with a piece of wood. It was probably intended to slide. They were big pieces of wood, about this size (indicating), which would be difficult for a woman to move, yes.

* * * *

FURTHER REDIRECT EXAMINATION

BY MR. WILKES:

Q. You referred to a fence that was removed and you indicated that it was used in part to construct a barricade by Ishee. Would you come down and point out in general the direction, whether it was an east-west fence or a north-south fence, just approximately the location on Plaintiffs' Exhibit No. 1. A. The one that was torn down?

Q. The one that was torn down, yes. Stand over this way, if you will, so the Court can see you, please. A. The broken down fence came from the apartment building off this far (indicating). I am not sure how far it went here, but I know it went past our property up to the Connors.

* * * *

FURTHER RECROSS EXAMINATION

BY MR. WAGMAN:

Q. Now, Miss Schreiber, that is the fence you said you didn't know whether it was along the right of way, the north end of the right of way or in further along the Ishee property? A. I don't know where their property line is.

Q. You never measured it then? A. No, I did not.

* * * *

Thereupon

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IV

TILLIE CHIDAKEL

p. was called as a witness for the plaintiffs and, being first duly
2 sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WILKES:

Q. State your full name, please. A. Mrs. Tillie Chidakel.

Q. And where do you reside, Mrs. Chidakel? A. I now reside at 1089 Ruatan Street, Silver Spring, Maryland.

Q. Is your husband Charles H. Chidakel? A. He is.

Q. Are you the same Charles H. and Tillie Chidakel who by deed dated October 31, 1947, took title to what is known as the Folger Apartments located at 409, sometimes known as 409-411 Second Street, Southeast, Washington, D.C.? A. That is correct.

Q. As shown by Plaintiff's Exhibit No. 8? A. That is correct.

Q. And are you the same Charles H. and Tillie Chidakel who IV-3 by deed dated September 14, 1956 conveyed this same property known as the Folger Apartments to Reed Liggitt? A. Yes, that is correct.

Q. By Plaintiff's Exhibit No. 12? A. Yes.

Q. What is your business, Mrs. Chidakel? A. We are in the real estate business.

Q. I see. And were you so engaged at that time? A. Yes.

Q. Were you familiar with the Folger Apartments during the period of ownership referred to by those two deeds which was the period between October 31, 1947 and September 14, 1956? A. Yes.

Q. Now, when you obtained title on October 31, 1947, was there an opening at the west side or along the rear line in the fence that led to the area colored in yellow? A. Yes.

Q. On Plaintiff's Exhibit No. 1. A. The entire area was open, and we used it constantly from the time we purchased the building.

Q. And what was that use for? A. We used it for taking trash in and out, garbage, and also for bringing in oil and for trucks as IV-4 we were remodeling the building at the time, to bring in merchandise of various kinds. Also, they brought in a new heating system and so on.

Q. Yes, and you converted, I believe, the building to oil, did you? A. We converted immediately upon taking possession. When we purchased the building, there had been a coal furnace which we discarded entirely; and we ordered Griffith Consumers to bring in an oil heating system, which was then installed.

Q. And where was the pipe with respect to which the oil was loaded by the nozzle from a truck? A. It was in the rear of the building adjacent to the heating room which was also in the rear of the building.

Q. Now, during the period of your ownership -- first, a Lydia and Mae Meaders owned the premises 149 D Street. In connection with the use of the right of way area colored yellow and, additionally, the south 12 feet of lot 849, extending to the public alley, did you ever seek or obtain from Meaders permission to use the right of way area? A. That never came up, and it was never mentioned or discussed.

Q. Now, subsequent to the Moaders ownership of 149 D Street and during the period of your ownership, that property at 149 D IV-5 was purchased by Tommy C. and Maryclaire Ishee, although as I understand it they did not move in during your period of ownership title actually vested in Tommy C. and Maryclaire Ishee, November 30, 1951. During that period of time, did you ever seek or obtain from the Ishees permission to use the right of way?

A. Never heard of them, no, sir.

* * * *

CROSS EXAMINATION

BY MR. WAGMAN:

Q. Mrs. Chidakel, when you purchased the property, you say there was a coal furnace? A. There was.

Q. Now, where was that coal furnace located? A. In the same room where the oil furnace is at present in the rear of the building.

Q. And how was the coal furnace, how was the coal brought into the property? A. I wouldn't know a thing about the coal, sir. We never bought coal.

Q. Isn't it a fact that it was brought in from the front? A. I wouldn't know that at all. We never purchased coal there.

IV-6 Q. Now, how wide was the gate at the rear fence, in the rear fence of the property? A. Well, I couldn't tell you about the width of the gate, not knowing; but I could tell you that I drove in there for a period of about six months daily with my husband while remodeling went on through the rear alley, which was the width of an automobile; and in backing out, we had to back out. We couldn't turn around.

Q. Now, when you purchased the property, there was a rear access, the gate was there, is that correct? A. Yes, definitely.

Q. How many apartments were in the building at that time?

A. Originally?

Q. When you purchased it? A. Six.

Q. And this is the way it had been since it had been built to the best of your knowledge? A. I know nothing about its history, really.

Q. And then you remodeled it, is that correct? A. We remodeled it.

Q. How many apartments? A. Sixteen.

V-7 Q. Sixteen apartments? A. Yes.

Q. Did you not put apartments in the basement at the time?

A. Yes.

Q. There had been no apartments in the basement prior to your purchase, is that correct? A. There were janitor's quarters and storerooms and locker rooms and such down there. The rooms were there. The windows were there. None were created by us. It was rearranged.

Q. Now, when you took title to the property, was there anything in your deed which gave you a right of way across the rear?

A. I do not know, sir.

Q. You do not know? A. No.

Q. Did you know that the alley did not extend up to the rear fence? A. It did extend in so far as my knowledge goes.

Q. In other words, as far as you were concerned, that was a public alley, was it not? A. Correct.

Q. And you didn't know that particular portion belonged to the Meaders or whoever owned the premises 149 D Street? A. We were never told anything of that nature.

Q. So you used it in complete ignorance of the fact that it belonged to somebody else, isn't that correct? A. I don't think that is correct, because I don't consider myself ignorant. I only know that there was an alley there. It was accessible through First Street. It led directly to our building, and we used it as such had been.

Q. But you did not know whether that was a private right of way, or a public alley, is that correct? A. It appeared to be from our standpoint as we saw it, because we entered from First Street into an alley. It appeared to be an alley like any other alley, and we had no knowledge of anything else.

I could not tell if it appeared to be a public alley then? A. Correct.

Q. And you used it as a public alley? A. Correct.

of wood, and * * * * *
probably like this
this size ()
move, yes.

Tr. Thereupon

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MARY CONNOR

I

p. 84 one of the plaintiffs, was called as a witness for the plaintiffs and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WILKES:

Q. State your full name, please. A. Mary Connor.

Q. And where do you reside? A. 5805 Potomac Avenue, North-west.

Q. Now, Miss Connor, the evidence in this case is that one Daniel Allman, Senior, on March 20, 1860, acquired title to what is now known as 170 and 172 North Carolina Avenue, Southeast. Are you related to Daniel Allman, Senior, now deceased? A. His granddaughter.

Q. Now, commencing in approximately 1915 a Hannah Allman Readie took title to what is now known as 170 North Carolina Avenue. Are you related in any way to Hannah Allman Readie? A. She was my mother's sister.

Q. On or about that time Margaret Allman Connor took title to what is now known as 172 North Carolina Avenue, Southeast. Are you related to her? A. Her daughter.

I-85 Q. What is the date of your birth? A. April 30, 1889.

Q. How old are you now? A. Seventy-four.

Q. When does your recollection of the property that is involved in this case commence? What is your earliest recollection? A. I would say maybe about between 1895 and 1900. I understand that I was about three years old when my grandfather raised the old frame, as they called it, and built the three bricks, sometime between '95 and 1900. I don't know whether I recollect or whether I heard it, but that is pretty accurate.

Q. And did he live in one of these houses? A. 170.

Q. That is, 170 North Carolina Avenue, Southeast? A. Yes.

Q. You now hold title with your sister to these two properties for life, is that correct? A. We hold title to 170 for life and 172 without any such restriction. It is just ours.

Q. I see. Now, there has been introduced into evidence the fact that building permits were obtained in 1924 for the construct-

1-86 ion of garages upon the rear yards of Lot 66 and 65, known as 170 and 172 North Carolina Avenue, Southeast. Do you have any knowledge with respect to those garages having been constructed? A. Yes.

Q. Were you there when they were constructed? A. No, I was visiting.

Q. Where were you visiting? A. I visited in Hawaii. I was away from December 18 when I sailed until I returned in the end of June. During that time, writing me letters from home, I knew that they sold our home at 130 D, Southeast, and that they were moving to 172; and we had a car; and we built the garage to house the car. It was all a part of the restoration over there, renovation.

Q. So you got back from Hawaii approximately what date? A. About the middle of June.

Q. Of what year? A. 1924.

Q. Right. Now, when the garage was constructed, what was it used for? A. To house our car.

Q. And what kind of car was that, do you recall? A. Yes, a Dodge.

-87 Q. Do you remember what year Dodge it was? A. I think it was '23.

Q. A 1923 Dodge. A. Yes.

Q. And was the car parked there regularly? A. Every day as we went in and out. We put the car in the garage at night.

Q. Was the area generally outlined in yellow on Plaintiff's Exhibit No. 1 surfaced in any manner at the time the garages were constructed in 1924? A. Yes, it was concrete, and to the best of our knowledge, that was all part of the renovation job at 172.

Q. Do you have any information and recollection and belief in connection with who paid for the paving? A. Well, I can't say, no.

Q. The paving was done, you say, while you were away in Hawaii? A. It was there when I came back, the garage and paving.

Q. Was the paving there before you went away in December to Hawaii? A. No.

Q. Now, from 1924 what use was made of the right of way area in connection with properties 170 and 172 North Carolina Avenue, Southeast? A. Well during the time we lived there, we used it as

you would use any alley. We put the trash out and we put the garbage out. Sometimes if we were going down to the shops on First Street, we went down the alley, and general alley use.

Q. Did your coal come in the back? A. No, because there was a chute provided going way back when the houses were built some time between '95 and '98 and they put a chute under the bay window in front of the house so that the coal could be shoveled right in.

Q. Your coal came in the front? A. Our coal came in the front.

Q. I see. How about your ice? A. Well, the iceman came in the back way, because, you see, he dripped the ice.

Q. How did he come up in those days? A. Well, the ice cart came up.

Q. Was that horse drawn? A. Well, I think it was still horse drawn at that time.

Q. I see. Did the time come then when he became motorized at a later date? A. Well, I couldn't say that.

I-89

Q. And down through the years up until August of 1962, was that use continued? A. It was.

Q. Mr. McCray, whom Mrs. Grigsby stated was the father of her best friend Harriet and that she has stated constructed the apartment house and fence at the time back in about 1905 and continued in title thereof until 1937, in accordance with the evidence in this case, did you know Mr. McCray? A. Well, I knew Mr. McCray and Harriet. Well, he was the man that owned the apartment and he was the man that went up and down the alley. He was Harriet's father. I didn't know him in the way Mrs. Grigsby did. In other words, we only had a neighborly association with him, not a close or friendly association.

Q. Do you have any personal recollection in connection with him commencing in 1924 opening up a hole in his fence and coming down to use the Grigsby garage? Do you have personal recollections about that? A. No, I do not have a recollection of that just happening. I just know that Mr. McCray had a gate and he came up and down; and I don't remember the gate being opened up; that is, I haven't a specific image of that happening.

Q. I see. Did that gate remain open over the years? A. Yes.

90 Q. And was it used over the years? A. Yes.

Q. For access to the property known as the Folger Apartments from 1924 on down today? A. Yes.

Q. In connection with your use of the right of way area colored on Plaintiffs' Exhibit No. 1, did you ever seek or obtain permission to use the right of way from Mr. and Mrs. Ishee? A. No.

Q. From Lydia or May Meaders? A. No.

Q. From Lee Walsky? A. No.

Q. During that period of time, was the right of way area here generally used from time to time for general alley purposes for premises 160, 70, 72, 74, 76 North Carolina Avenue and also 409-411 Second Street? A. Yes.

Q. On or about August of 1962, certain fence, fencing and barricades were installed along the west line of the yellow area and along generally the north property lines of the North Carolina Avenue houses. Did you consent to the construction of those items by the defendants 92 Ishee? A. No.

Q. Upon their construction, did you employ counsel with respect to obtaining the removal thereof? A. Yes.

Q. And you were a party to the temporary restraining order of May 20, 1963? A. Yes.

Q. And the preliminary injunction of June 6, 1963? A. Yes.

Q. Or fences or fencing or however they might be described? A. Yes, when Mrs. Grigsby and Ann Schreiber called us and told us this thing was being put up in the alley, I think my sister and I went over. I think it was the next day. Anyhow, it was the second next day, and we actually saw the thing in the alley; and once or twice since we have gone back and looked at it.

Q. The type and character of the fence, fencing, barricades, or gates, or however they may be described, were they of such a nature as to constitute an impediment in so far as you were concerned 93 as owner of these two properties? A. Well, our tenant complained that he couldn't get his car in and out.

Q. In and out of what? A. The garage. He was in 172, and he couldn't get his car into the garage. He said he tried several times over many days and couldn't get his car in. He complained to me about it.

CROSS EXAMINATION

BY MR. WAGMAN:

Q. Miss Connor, how long did your parents live in 170? A. Well, my father never lived there; but after his death in 1923, we moved over to North Carolina, you understand. I was away in the spring of 1924. And I returned from visiting my brother in June, and we lived there then until June 1926. Then later in 1947 we moved back again, and we lived there until 1950. But my aunt lived in 170 all those years, and we were very frequent visitors. And, also, we had a tenant, you see, from time to time. So we have always been in touch.

I-93 Q. A tenant for where, 172? A. Yes.

Q. Which you have rented out continuously, is that right?

A. Yes.

Q. Now, do you drive? A. Not now, but I did drive for years.

Q. Do you know the size of those two garages to the rear of the property? A. Well, not by feet, but I know we got the car in with room for trash and garbage cans.

Q. When was this? A. When we lived over there. We only had one garage.

Q. In 1924 you were able to get a car in then? A. Yes.

Q. Do you know whether a modern car, one of the contemporary automobiles, will fit into that garage? A. Well, a compact would. I think some of those great long ones would not.

Q. Then the average American car will not, but a compact would, is that correct? A. I don't know. I never checked it out.

Q. You now rent out 172, is that correct? A. Yes.

Q. And 170 as well? A. Yes.

Q. How often do you visit there? A. Well, we visit Mrs. I-94 Grigsby off and on quite frequently; I don't visit the tenants.

Q. Did you ever have occasion to observe any cars parked by any of your tenants in those garages in recent years? A. No, I haven't been over there and actually seen their car in the garage.

Q. Have you ever had occasion to observe the condition of the garages in recent years? A. Yes.

Q. Did you know that a door had fallen off one of the garages? A. Yes.

Q. Do you know when that occurred? A. No, we do not.

Q. How was it brought to your attention? A. Well, when this came up about the alley and the tenant made the complaint, that was another complaint he made, that the door had become, he said, unhinged.

* * * *

-95 Q. In other words, even a compact car has difficulty getting in and out of that garage? A. With the fence up, not with the fence down. When I speak of fence, I mean the impediment that was put up in the alley.

Q. Which impediment? A. The one that the Ishees put up and we are talking about.

Q. When-- A. In the middle of the right of way.

Q. When did both doors come down on the garage? A. It came to our attention when we went over to observe this obstruction which was put up in the alley.

Q. Well, was it only one door unhinged at that particular time?

A. The door in 172 is down.

Q. One door or both doors? Well, there is only one. It is a great door that slides back and forth, and then there is a little door for access when you don't want to swing the big door back.

Q. How do the doors open? A. You push them. They work on slides.

96 Q. And where do they slide to? A. They slide around to the back, you know. Here is the door (indicating). You push it and it goes on a sort of trolley around and rests against the side wall.

Q. And it opens up into the alley? A. Yes. I am talking about something that I observed strictly as far back as 1924 and '25. The tenants have been there, and they have done things off and on. I am telling you how the garage worked in 1924.

Q. Then you don't know how the doors have been working in recent years. A. Well, it was off the track, you see. I know this, that we never made any repairs that altered the operation of the door. It might have fallen down in the way it was operating. I know we never repaired it to change the operation of it.

Q. Do you know why the garages were set back on the property?
A. No.

Q. Do you know whether or not any of the tenants in moving cars in and out of the garage have crashed into fencing on the north end of the right of way? A. Now, are you speaking of the obstruction put up in the alley in '62?

I-97 Q. No. Fencing now in the north end of the right of way? A. North end of the right of way? You mean the rear of Mr. Ishee's back yard?

Q. Yes. A. No. I have no knowledge of that.

Q. Do you know whether or not any of your tenants ever collided with cars off the right of way and in the back of the property, Mr. Ishee's property? A. No.

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I-99 Q. Do you know where Mr. McCray and Harriet parked their cars I-100 from the period 1924 on? A. When you say parked, do you mean whether they left it in the alley or out front or what?

Q. Do you know whether they rented a garage from your cousin, Mrs. Grigsby? A. Yes, I know that.

Q. They did rent it. Do you know how long that rental period continued? A. No. It began some time after the garages were built.

Q. And do you know whether it went on for a long period of time? A. Well, I don't remember.

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REDIRECT EXAMINATION

BY MR. WILKES:

Q. You state that during the period of time that you did not live here on North Carolina Avenue you came back periodically and frequently to visit Grigsby. Are you related to Grigsby? A. Second cousin.

* * * *

JULIA D. CONNOR

Tr. Vol. one of the plaintiffs, was called ~~as~~ a witness for the plaintiffs IV p. and, being first duly sworn, was examined and testified as follows:
9

DIRECT EXAMINATION

BY MR. WILKES:

Q. State your full name, please. A. Julia D. Connor.

Q. And where do you reside? A. 5805 Potomac Avenue, north-west.

Q. And what is the date of your birth? A. January 2nd, 1887.

Q. And you are how old today? A. 76.

Q. Now, what relation to you was Daniel Allman, Senior, who took title to 171-172 North Carolina Avenue, March 20, 1860, according to the evidence in this case? A. He was my grandfather.

Q. And Hannah Allman Reedy was what relation to you? A. My aunt; my mother's sister.

Q. Margaret Allman Connor? A. My mother.

Q. Your recollection of the property involved in this case goes back to approximately what time? A. When I was a little girl I heard them talk about it, from the time I was a little girl seven years old, maybe the age of reason. I heard them talk about it.

* * * * *

Q. Try to speak to the back row in the courtroom, if you will, please, right over the top of my head. Now, from the time of Daniel Allman's death right down to date, 170 and 172 North Carolina Avenue, Southeast, has consistently been in your family, is that right? A. That is correct.

Q. And since before Daniel Allman's death, the property has been in Grigsby and her ancestors, isn't that correct? A. Well, no, I don't think so.

Q. If you have knowledge. A. No, I don't believe that that property has been in that end of the family as long as this other has been. They purchased that property, I can't remember the date, but many years ago from someone else, but long after my grandfather purchased it in 1860.

Q. Right. Now, there is in evidence the fact that a building permit was issued in 1924 for the construction of garages at the rear of 170 and 172 with respect to which you are either owner for life or in fee simple at this time, is that correct? A. We own one house outright that belongs to us and the other for life. 170 we own for our lifetime, and 172 is ours outright.

Q. Now, in 1924 the record shows a building permit was issued for the construction of garages at the rear of 170 and 172. Do you have recollection of those garages being constructed? A. I do.

Q. And at the time of the construction of those garages, was there also constructed paving over the area outlined generally in yellow on Plaintiff's Exhibit 1? A. Yes, I think it was about that time; and my recollection is, I know that my mother paid for part of it; and I think probably the other owners did at that time. I IV-12 can't be too sure about that. I don't think she was the only one involved; perhaps my mother and my aunt and maybe some others, but I do know it was paved by them.

Q. From the standpoint of your personal knowledge, who paid?

A. I can't be too sure. I know my mother did.

Q. You know that your mother did? A. Yes, I do.

Q. Now, what use was made of the garage at that time, your garage? A. Well, we used it to park our car.

Q. What kind of car was that? A. A Dodge.

Q. What year? A. I think it was '23.

Q. A 1923 Dodge? A. Yes, '23.

Q. And then in 1924 and thereafter, was that area which was paved used? A. Yes, to the best of my knowledge and belief it was used for the purpose for which you would use any alley, you know. The iceman came and the delivery men and trucks, or anything, for any purpose that you would use an alley. It seemed to be open to everybody.

IV-13 Q. Did you consent to the erection of the fencing and barricades or whatever they might be called? A. I did not.

Q. In August of '62? A. I did not.

Q. And you employed counsel for the purpose of having them removed? A. I did.

Q. You are a party to the temporary restraining order and the preliminary injunction? A. That is true.

Q. During that period of time, did you obtain permission to use the area outlined in yellow from Ishee? A. You mean since '62?

Q. Did you ever obtain permission from Ishee, either Mr. or Mrs. Ishee, to use the right of way area outlined in yellow? A. No, I didn't, because I always understood it always belonged to us.

Q. Did you seek or obtain permission from Lydia or Mae Meaders? A. No.

Q. From Lee Walsky? A. No. I remember that name, but I

-14 couldn't tell you anything more about it. I remember hearing the family talking about Walsky, but I can't remember except they owned the property. That is all I know.

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CROSS EXAMINATION

BY MR. WAGMAN:

Q. Miss Connor, were you living in 170 at the time the garage was built? A. I never lived in 170.

Q. 172? A. Yes.

Q. You were living there at the time the garages were built, is that correct? A. Well, yes, I guess so. We moved, I was just thinking, we moved back there. Yes, I guess we did.

Q. You were not in Hawaii then with your sister? A. I was not in Hawaii, no.

Q. And prior to the erection of the garages, was the rear of 170 and 172 enclosed? A. I can't state definitely, I can't; but it seems to me there was a board fence back there; but I can't be too sure about that.

Q. Do you recall whether that board fence extended along the 15 entire width of the lot 848 to the rear of your property? A. Well, now, when you say lot 848 --

Q. From the Ishee property; in other words, from the apartment house here on across (indicating). A. Whether the garage--

Q. The board fence prior to the garages extended the width of the property. A. Well, as near as I can state that, there was probably a fence on our side of the right of way and maybe a fence on the other side of the right of way on the Ishee property.

Q. When the garages were built, do you recall whether the owner of the property now owned by the Ishees was one Lee Walsky? A. I heard that name, but I can't be too sure.

Q. After the garages were built, was there another fence erected along the right of way? A. Another fence erected where?

Q. Along the right of way running east and west. A. Well, the garages come right out on the alley.

Q. Wasn't there a fence: A. Over on the Ishee property.

Q. Along the north line of the right of way running east and 16 west? A. I can't swear to that. I can't be too sure, but I think

there was.

Q. Now, how much of the right of way and the entrance to the garages was paved when the garages were built? A. I think when the garages were built that that whole area of the right of way was paved; and I know that my mother paid part of it; and it seems to me there were others, probably my aunt. I don't know. I can't recall the names now.

Q. Do you know whether Mr. Walsky paid any part of it? A. That I can't be sure of.

Q. But it is possible that he did pay part of it? A. It is possible, but I can't be sure of that.

Q. Now, do you know why the garages were set back from the rear of the property line? A. Well, now, it is difficult for me to answer that now, because I was sort of young then, as it were, didn't pay too much attention to all these little details.

Q. Isn't it a fact that the garages were set back so that a car could be driven in without too much trouble? A. I learned that recently, but I didn't think too much about it through the years.

Q. You have lived there the same periods of time that your IV-17 sister has lived there, is that correct? A. Yes, we have been together.

Q. And you have visited there quite often from time to time through the years when you did not live there? A. Oh, I have visited that area many times through the years. My aunt lived at 170 for a long, long time. She died fifteen years ago. Since then, we visited my cousin, Mrs. Grigsby, who lives there next door. So we have visited there, although on those occasions we went in the front way and had no occasion to go out and survey the alley.

Q. And you had no occasion to notice the condition of the garages and garage door? A. From time to time we would go over there and just sort of look over the ground, but I mean--

Q. During the past few years, have you ever had occasion to make repairs to any of the garage doors? A. I don't think so.

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IV-18 Q. You have had your houses rented, well, 170, since your aunt died fifteen years ago? A. Yes.

Q. Is that correct? A. Yes.

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RECROSS EXAMINATION

BY MR. WAGMAN:

Q. The alley was used by everyone, was it not? A. Yes.

V-21 Q. For the convenience of the -- A. I would say so.

Q. -- for the convenience of the houses on North Carolina Avenue which backed up on that alley, is that correct? A. I would think so.

Q. And the right of way was open and seemed to be a part of the alley, did it not? A. That is correct.

Q. Do you recall how wide the full right of way was? A. Now, young man, when you ask me to tell you whether it is ten or twenty feet, I am just lost. That is all.

Q. As far as you are concerned, the alley just extended right past your door and went up to the board fence? A. A regular alley that we all used and never thought it was anything else, just as you would any public alley, you might say.

Q. And that included this open space in back of the garages as well, it was all part of it, wasn't it? A. All part of the alley, yes, I would say so.

Q. So that the garages were set back, then, and that open space was left for the convenience of all the people using the alley? A. Everybody used the alley. I would say that is a correct statement.

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Q. Have they been rented since 1960 consistently? A. Well, you say consistently, there were periods, of course, when tenants would go and come; but pretty much, I guess, since 1960.

Q. That goes for both houses, does it not? A. I think so.

Q. And your rentals have remained the same, have they not, or have they gone up? A. Through the years, oh, no, they have increased well, in the last two, three years.

Q. They have increased, have they not? A. Yes, I would hope so.

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REDIRECT EXAMINATION

BY MR. WILKES:

Q. Miss Connor, you have testified that back in 1924 when the garages were constructed the old Dodge would come up and go into the IV-19 garage-- A. Brand new Dodge, be careful.

Q. Excuse me. It depends on where you are standing when you look at 1924. From my standpoint, that is old now, but it was new then. I direct your attention to Plaintiff's Exhibit No. 23 and call your attention to the set backs of these garages and the barricades fence of Ishee that was erected along this property line. Now when the car, when the old -- strike old -- when the Dodge came up to the garage marked 170, did it go just within this little set back area or did it come around through the right of way area? A. You mean, when the tenant attempted to park the car? I didn't understand the question.

Q. Let me try to clarify it, if you will. Back in 1924 you said you had a Dodge? A. That is true.

Q. After this garage was constructed the car would be parked in the garage? A. Yes.

Q. Now, did that car drive up this little footpath between the right of way or did it go in the right of way area itself? A. Oh, IV-20 no, it went right out. We just thought of it as an alley for everybody's use. We drove the car right up the alley as you would in any other alley.

Q. In other words, directing your attention to Plaintiff's Exhibit 21, your car would come up the right of way rather than in this little set back area and turn in, is that correct? A. That is correct, yes.

RECROSS EXAMINATION

BY MR. WAGMAN:

Q. The alley was used by everyone, was it not? A. Yes.

Q. For the convenience of the-- A. I would say so.

Q. --for the convenience of the houses on North Carolina Avenue which backed up on that alley, is that correct? A. I would think so.

Q. And the right of way was open and seemed to be a part of the alley, did it not? A. That is correct.

Q. Do you recall how wide the full right of way was? A. Now, young man, when you ask me to tell you whether it is ten or twenty feet, I am just lost. That is all.

Q. As far as you are concerned, the alley just extended right past your door and went up to the board fence? A. A regular alley that we all used and never thought it was anything else, just as you would any public alley, you might say.

Q. And that included this open space in back of the garages as well, it was all part of it, wasn't it? A. All part of the alley, yes, I would say so.

Q. So that the garages were set back, then, and that open space was left for the convenience of all the people using the alley? A. Everybody used the alley. I would say that is a correct statement.

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MAURINE T. HORTON,

01 one of the plaintiffs, was called as a witness for the plaintiffs and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WILKES:

Q. State your full name, please. A. Maurine Thompson Horton.

Q. And where do you reside? A. 176 North Carolina Avenue, Southeast.

Q. And is that the property that has been marked Horton on Plaintiffs' Exhibit No. 1, which is Lot B in Square 734? A. Right.

Q. And are you the owner of that property? A. Yes, I am.

Q. When was the first time that you resided in that property? A. 1937.

THE COURT: 19 what?

THE WITNESS: 1937.

102 BY MR. WILKES:

Q. And how long did you reside there at that time? A. Almost two years.

Q. Did you own it at that time? A. No, I rented.

Q. At that time did you ever have occasion to see any use made by this property of the right of way area colored in yellow on Plaintiff's Exhibit No. 1 and the south twelve feet of Lot 849, which stands between the yellow and the public alley? A. Yes, I used the back yard to hang up my clothes.

Q. And how was that house heated at that time? A. With coal.

Q. And how was the coal brought to the house? A. In the back. There was a coal bin in the back.

Q. The back of the house? A. In the back of the house, in the back yard right in the corner.

Q. And how was the coal brought in? A. With trucks.

103 Q. How would the truck get to the property? A. Through the alley.

Q. Did you ever observe what was the situation with respect to trash and garbage? A. The trash and garbage were taken out the back.

Q. Then there came a time, according to the deed and record, the title was conveyed by deed dated August 3, 1945, to Maurine T. Horton. Are you that Maurine T. Horton? A. I am.

Q. And when you purchased the property, did you then move in? A. I moved in in April. I moved in before the title was cleared.

Q. You moved in before settlement? A. I did.

Q. And have you resided there since that date? A. Yes, I have.

Q. And has the trash and garbage continued to be disposed of by pick up by truck coming up through the public alley and right of way area to the rear of your property? A. Yes, it has.

104 Q. I see. Now, since you have owned this property, have you had occasion to observe other uses by other owners of the right of way area? A. Well, I have used it for building material. The trucks would come up. And at the time I also, when I first moved in, I used coal also; and then I later converted to oil; and then

they brought my oil in the back.

Q. I see. During the period of your ownership since August 3, 1945, through this date, did you ever request permission of a Mr. Lee Walsky, Ishees predecessor in title, to use the right of way?

A. I did not.

Q. Did you ever request or obtain permission from Lydia or May Meaders? A. I did not.

Q. Did you ever request or obtain permission from Thomas C. and Maryclaire Ishee? A. I did not.

Q. Did you consent to the construction of fences, fencing, barricades, gates, or whatever they may be described as being, along the west end of the area colored in yellow and along generally the north property lines of the North Carolina Avenue houses extending over approximately to Schreiber? A. I did not.

* * * *

Q. Mrs. Horton, did you consent to the erection of the post, fence, and fencing that was constructed by the defendants Ishee in August of 1962? A. I did not.

Q. And you were a party to this proceeding? A. I was.

CROSS EXAMINATION

BY MR. WAGMAN:

Q. Miss Horton, do you drive? A. I do not.

Q. Do you own a car? A. I drive, but I don't drive in the District.

Q. Do you own a car? A. I do not.

Q. What portion of your lot abuts on the right of way? A. I just have a gate there.

Q. Just enough room, then, for one gate. How wide is that gate? A. I don't know, about three or four feet, I guess.

Q. Is it enough for a person to pass through, is that correct? A. right.

Q. Now, when was that gate erected? A. I don't know what month, but it was this year.

Q. What did you have prior to that time? A. I had an old fence.

Q. An old fence in there. Isn't it a fact that when that gate was erected it was erected over the property line and on the right of

way? A. Not that I know of. It is where the fence was before as far as I know.

Q. Did you have a survey made before you put up that gate? A. No, I did not. I still use the same steps that were there, a concrete step.

Q. Do you know when that concrete step was put in? A. It was put there before I went there.

Q. Do you know whether that concrete step is on the right of way? A. I do not.

I Q. Where do you put your trash when you put it out? A. Just 107 outside the gate.

Q. Then you put it on to the right of way, is that correct?

A. In the alley.

* * * *

Q. I show you these photographs. Will you identify them, please? Are you familiar with the photographs?

MR. WILKES: May I see them, please, sir.

THE WITNESS: I will have to have my glasses, because I can't see. They are in my pocketbook if I can get them.

BY MR. WAGMAN:

Q. Are these your trash cans? A. I believe they are.

Q. And there is another photograph of your trash cans? A. Yes.

* * * *

I Q. When did you renovate your building, Miss Horton? A. Well, 108 I started when I first went there in '45. I converted into five apartments.

Q. Your building is now five apartments? A. It was.

Q. Yes. A. But now it is four.

Q. Four apartments. A. I have the first floor.

Q. Do any of the tenants use the rear? A. You mean, to come in and out? A. Not that I know of.

Q. You are the only one who uses that rear gate, is that correct? A. Right.

Q. That is primarily for trash removal? A. Trash, garbage.

Q. What kind of-- A. And all building materials.

Q. All building materials. What kind of heat do you have in there now? A. Gas.

Q. Gas? A. Yes.

Q. When you bought the house it had coal, is that correct?

A. Right.

Q. And then you converted to oil? A. Right.

Q. Subsequently you converted to gas? A. Right.

Q. Do you take the trash cans in on Monday or do you sometimes leave them out? A. I have left them out overnight. If I am downtown shopping and it is dark, I don't go into that alley after dark.

Q. Why not? A. I just don't go out there by myself. I don't go out my front door by myself at night.

Q. When did you have your premises worked on this year? A. They have been working on them just about all the year.

Q. All the year? A. Since April or May, I guess.

Q. Since the injunction was granted in this particular case, have you had workmen in your building? A. Sure.

Q. Have you had workmen park their vehicles in the rear on the right of way? A. I sure have.

Q. For days on end? A. Not days on end, because they could come in, and probably not overnight, in days, because the policeman put them off the streets out front and made me put them in the alley.

Q. Then you permitted people coming to visit you or to work on your premises to park their cars in the right of way during the daytime, is that correct?

Q. I didn't permit them to. The policeman took them outside and told them to come around in the alley.

Q. But they parked in the right of way, did they not? A. I didn't go out and see where they were parked.

Q. Did you know there was an injunction prohibiting anyone from using the right of way? A. You mean up in the enclosure?

A. Yes. A. I don't know whether they came up in the enclosure, because I didn't go out there. I couldn't swear to that; but before I left for work that morning, he came in and said the policeman made him come up in the back.

Q. Did you ever have a Mr. Hunter do any work for you? A. I did.

Q. And did he work for you in August of this year? A. He worked for me this year.

Q. In August? If I say August 12th, August 13th, August 26th, September 18th, would you say those dates were fairly accurate, to the best of your recollection? A. I wouldn't say, because I don't remember the month.

Q. And if I were to tell you that he parked his -- do you know what kind of truck he had or van? A. I do not.

Q. If I were to tell you that he had a white Metro van? A. That would mean nothing to me, because I didn't see it. He was the one who told me the policeman told him to come around the back and come up in the alley.

I Q. Weren't you out there? Didn't you see the carpenter shop 112 on wheels parked back there? A. I was dressed for work, and he came by the side door.

Q. Is there access to the side door from the rear? A. Front and side and back. I have four entrances on the first floor.

Q. Can you get to the side door from the right of way through the gate you have? A. Sure.

Q. You can? A. Yes.

Q. Did you or did any of your workmen working on your building ever put debris or trash into the right of way? A. That I do not know.

Q. Do you know what was done with the debris from renovating your house? A. There was a truck that hauled away one load.

Q. How many loads were there? A. I don't know. There was a truckload hauled away.

Q. Did you personally ever throw any concrete or any other building debris out into the right of way? A. Throw it out, I did not.

I Q. Put it out? A. I put it out.

113 Q. How did you put it out? A. By hand.

Q. By hand. Then it was not in any container? A. Oh, no, it was in bags.

Q. Paper bags. A. Right.

Q. And how many paper bags full were there, if you recall? A. I don't know.

Q. Have you ever had any people visit you? A. Have I? Why, certainly.

Q. Have they ever parked their cars in the rear? A. Not to my knowledge.

Q. How often do you go out to the rear of the building? A. I take garbage out on Wednesdays or Tuesday nights and Friday nights. I take out my trash on Sunday afternoons.

Q. You mean there is a garbage collection on Tuesday-- A. Wednesday mornings and Saturday mornings.

Q. And trash removal on Monday morning, is that correct? A. Yes.

Q. So you would go out, then, approximately three times a week, is that correct? A. Right, to take these things out, and then I have to go out and bring them back in.

Q. During the years you have lived there, have you had occasion to observe the right of way? As to the condition in which it has been kept? A. Have I?

Q. Yes. A. Why, certainly. I have been out there two or three times a week.

Q. Have you ever noticed debris or trash or any old furniture or any other items out there? A. Yes.

Q. Do you know from where any of that came? A. I do not.

Q. Do you know whose responsibility it was to get that removed from there, that trash?

MR. WILKES: I object, if Your Honor please. If she didn't know who put it there, I don't see how she would know who is responsible for taking it away.

MR. WAGMAN: I will reframe the question, if I may.

BY MR. WAGMAN: *

Q. Do you know whether it was the responsibility of the District of Columbia to keep that right of way clean or whether it was the responsibility of someone else? A. I know the District of Columbia did clean the alley occasionally; and they would come up and ~~sweep~~ and clean and get up the trash.

Q. Was that all the way up to your gate? A. Yes, it was.

Q. And did you ever see them do it? A. Yes. I didn't see them do it. I have been out there after it has been done.

Q. Then how do you know it was the District of Columbia that did it? A. Well, I thought it was generally understood.

Q. Then you never did see them, and it is just a general assumption on your part?

(No answer).

Q. Did you ever see people using that right of way, going through it? A. You mean, going in and out?

Q. Yes. A. They used my side porch for years as an alleyway, that is, the same as an alley to go in the back; and I certainly have known about it. I have run kids off, a million of them.

I Q. Where is your side porch? A. To the left of my house.

116 Q. Facing Second Street? A. Facing North Carolina Avenue.

Q. Then this portrayal in here is not accurate, am I right?

A. I have a side porch.

Q. You have a side alley, too, do you not? A. Right.

Q. And the side alley is not shown-- A. Not an alley. It is a concrete porch that leads out where the kids could go all the way across, even there on D Street.

THE COURT: In order to get into that concrete porch, do you have to enter it from the alley or can you get into that concrete porch from the front?

THE WITNESS: Both ways.

THE COURT: You can get in both ways?

THE WITNESS: Both ways.

BY MR. WAGMAN:

Q. And how wide is that concrete porch? A. I would say five feet.

Q. So this has been used as a pass through, then, is that correct? A. For kids until I run them off.

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I Q. Will you please tell us in what way the barricades or the 117 gates, the fence, the gate posts, interfered with your use of the right of way? A. Well, I could still put my trash out.

Q. Was your trash collected while the gates were up? A. Yes.

Q. There was no interference with your trash or garbage removal, was there? A. So far as I know, no.

Q. Was there a restriction in terms of the use of the right of way by unauthorized people as far as during that time that the gates were up? A. I beg your pardon.

Q. I will rephrase the question. During the time the gates were up from August until about May or June of 1963, was there a lessening of traffic through the right of way? A. Well, there was in my place, because, well, the fence was up and it was hard to get in unless you crawled through there.

Q. What fence? A. You mean, after the fence went up there?

Q. The gates put up by the Ishees. Did you ever try to open 18 one of those gates? A. I surely did.

Q. Did you know how they operated? A. I surely do.

Q. How? A. It was two pieces of board with a slip board in here with a nail on it; and you had to juggle this thing back. And they were just half put there. The kids would play on them. They would rock back and forth, vibrate.

Q. The children played on them, you saw the children play on them? A. I can swear to that, the children did.

Q. Did they open the gates? A. I don't know if they opened them or not.

Q. You saw them move it, though, didn't you? A. I saw them on the fence.

Q. And you saw them moving the gates back and forth, did you not? A. You mean, open them?

Q. Open them, move them, any way you want? A. I never saw them open them, because I used to crawl through when I had to go through.

Q. Crawl through? A. They are in an X like this (indicating) and I could go through here.

19 Q. Then you never bothered to open one? A. I have tried to open them. It was difficult, and it was easier to crawl through then to open them.

Q. Which gate is that? A. The one there in the center.

Q. And for what purposes did you have to go through the gates at that particular time? A. Well, it is a shorter route for me to go down to First Street.

Q. To the stores? A. Right.

Q. Prior to the gates being up, had you ever heard of any noise or any other improper conduct in the back?

MR. WILKES: If Your Honor please, I object to this line of

questioning on the basis that it would have utterly no effect with respect to the right or obligations of the parties to this suit.

THE COURT: Unless you can identify some of this with these people that are involved in this suit, I don't see that it has any relevancy at all here.

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BY MR. WILKES:

Q. The step that you referred to that was over to the right of way area, that was where your old fence was there; and when your new fence went up, was that step also there in 1937? A. Yes, it was.

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JOHN R. PERRY

was called as a witness for the plaintiffs and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WILKES:

Q. State your full name, please, sir. A. John R. Perry.

Q. And where do you reside, Mr. Perry? A. Silver Spring,

Maryland.

Q. And for whom are you employed? A. Owenstein Brothers and Donohue, Inc., Section 52.

Q. How long have you been employed in that organization? A. Since March 1927.

I 121 Q. Now, I direct your attention to what is in evidence as Plaintiffs' Exhibit No. 1 and point out to you the location of First Street extending to an area that is colored in yellow that is at the rear of premises 149 D Street, S.E., and extends to the rear line of an apartment known as the Folger Apartments, numbered 409-411 and sometimes known by either one of those numbers, Second Street, Southeast, Washington, D.C. Now, I will ask you, sir, if Owenstein and Donohue ever managed that apartment building known as the Folger Apartments. A. Yes, sir.

Q. For whom? A. For Mr. Reed Liggitt.

Q. And during what period of time did your management extend?

A. From August 1957 to December 1960.

Q. Did you at any time have occasion to go to the property at that time? A. Yes, sir.

Q. During the period of your management, was the trash and garbage taken out the front or taken out the back and down the alleyway? A. From the rear through the alley.

Q. How about oil for heating hot water and for heating the building? A. I am sure that was taken in from the back.

Q. At my request, have you made an investigation and sought out your own recollection and your records in Owenstein and Donohue to see if there is any evidence of any consent having been obtained from Tommy C. and Maryclaire Ishee, the owners of the property during that period of time, to the use of the right of way area from the area from the rear down the public alley? A. Yes, I checked the records, and we never had occasion to request consent. The question never came up.

MR. WILKES: No further questions.

CROSS EXAMINATION

BY MR. WAGMAN:

Q. Do you know of your own knowledge, Mr. Perry, whether any of the services had ever come in through the front of the building? A. To my knowledge, they hadn't.

Q. Had you ever had occasion to discuss anything about the rear entrance or exit and the right of way back there with Mr. Liggitt? A. No, sir. The question never came up.

Q. Did you know that the rear right of way was a private right of way and was not a public alley? A. No sir.

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H. CURLEY BOSWELL

23 was called as a witness for the plaintiffs and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WILKES:

Q. State your full name, please, sir. A. My name is H. Curley Boswell.

Q. And where do you reside? A. I live at No. 11 D Street, Southeast.

Q. When were you born, sir? A. I was born in 1908, fifty-five

years ago.

Q. How long have you been familiar with the property that is involved in this case? A. My entire life. I have lived continuously at No. 11 D.

Q. Have any of these properties ever been occupied by anyone that is related to you? A. Yes, very much so. The property, 160 North Carolina Avenue, is occupied by my aunt, the mother of Mrs. Grigsby, who was my mother's sister. The house next door was occupied by a first cousin of mine, who was the aunt of Mrs. Connor, 124 Mrs. Radie. And the 172, after 1924, was occupied by Mrs. Connor and her two daughters are here today. The Connors previously lived on D Street around the corner at 130, which I was in and out of all my life up to the time they moved in 1924.

Q. Do you recall the time when the garages were constructed under building permits which the public records show were issued in 1924? A. Yes. As I recall, the first garage was built by Arthur Breuninger and his wife, who is my aunt; and at that time the people next door, James and Hannah Radie, decided they would also build a garage; and it so happened at the same time that Mr. Connor, Mrs. Radie's brother-in-law around the corner had passed away; and Mrs. Connor and her daughter remodeled the 170 North Carolina Avenue extensively at that time.

Q. Were those garages subsequently used? A. Yes, they were used. Right at that time, prior to Mr. Connor dying, they had a Dodge car which at that time they just transferred to use around there; and Mr. Jim Radie, Uncle Jim, had a car. I don't know whether his was a Dodge or not. I have forgotten. And then the Breuningers I did not own a car of their own. The Breuningers garage was a two- 125 car garage, and it was occupied by Mr. McCray or part of his family in the neighborhood and at other times had been used by other people over a period of time, of years. Mr. McCray, I think, died in 1937. I am not sure of these dates, approximately.

Q. Now, the McCray that you are referring to lived where? A. That was Harriet McCray's father who built the building. He lived in the apartments there called the Folger whose address is on Second Street.

Q. 409-411 Second Street, that line in green on this plat? A. Yes.

Q. And how did he get back and forth to his garage? A. He went back and forth to his garage over that alley.

Q. There was an opening in the fence, was there, at the rear of the apartment? A. There was a gate for him to get in and out.

Q. Now, have you been familiar with that right of way area from 1924 down to today? A. Yes, very much so.

I 126 Q. Now, there came a time when Mr. McCray, the record shows, conveyed to a David Bernstein the premises known as the Folger Apartments; and during the period from 1937 to August of 1962, were you familiar with the property? A. Yes.

Q. During the period of time, what use, if any, was made of the right of way area in yellow and the southern twelve feet of this Lot 849 for the apartment house? A. Well, I had reason to go up in that alley many, many times. In so going to 160 North Carolina Avenue, I would call up from my house on B Street, to save time, to say I was coming in the back way, to make it easier for my aunt at that time; and I would come in through the garages; and I would just park my car outside; and there was no objection to it. If somebody wanted me to move, they tooted the horn. At times going up there, I had seen a plumber truck or a man repairing a roof, almost anything would be up in there.

Q. Did you observe anything with respect to trash or garbage removal in the alley area? A. I have seen trash cans and garbage cans in the alley, yes, all the way down the alley, sometimes in the lower section it is frightful.

Q. Did you ever observe any coal trucks? A. I can't say I have observed a coal truck. I think I have seen an oil truck in there. I don't think I remember the coal trucks.

I 127 Q. Any ice trucks? A. I remember some ice trucks, because when the ice trucks would come up all the little kids used to come up and hop on the wagon to grab pieces of ice. Little kids in the neighborhood.

Q. When you say wagon, this was a truck? A. Yes, it would be a truck, automobile. I call it wagon. Mr. Ferris was the ice-man who had that section.

Q. And has that use for general alley purposes continued over the years of your own recollection of this area? A. It has.

Q. From the time of the construction of the garages right on down to the time of August 1962? A. Yes.

Q. Have you made any use yourself of the garage facilities there? A. Yes. I am in the business of restoring houses, and I have a few nice marble mantles stored there. I take one out and maybe put one in. And I just sort of have forgotten about this right up until the last moment. I went to work for the Beechnut Packing Company, and at that time I rented that garage from my aunt and paid her. What I am doing now is just on a family basis, of the garage being used.

I 128 Q. Were you present at or about the time that the fences, fencing, barricades, whatever you may call it, were constructed by Ishee around August of 1962? A. Yes. On that morning or thereabouts, Mrs. Grigsby, my cousin, called. And I was familiar with the property. I have a plat book at home on the Capitol Hill Section and I took out my plat book, drove up in the alley, my brother and I, and parked our car there, the Ranchero, and took the plat book, opened it on the radiator, and spoke to the men working and I asked them if they had a permit for the work, because I was sure it was going to come down, because I did not think they had a right to build a fence there. And shortly thereafter, my sister Camille, took photographs with her old Brownie camera which came out fairly well. They are here somewhere, I guess; and that was the morning they were putting up this so-called gate fence or whatever you want to call it, very primitive.

Q. Did you on behalf of Mrs. Grigsby make any statement to the Ishees or any of their employees or contractors in connection with whether or not the work should proceed or stop? A. I said, "It is foolish for you to proceed with this because I am sure it will come down." That was my opinion, putting a fence in an alley.

I 129 Q. Now, the fence along the west line of the right of way extended but a short distance in front of the garage of the Grigsby home that you have been using, is that correct? A. When we arrived at the scene, there was a post which was shortly thereafter removed but no protest as far as I was concerned from first coming there. There was one post further west.

Q. By that you mean further along? A. Further west.

Q. Along this direction from the yellow area? A. Yes, that is right, further west; and I think it shows the ground broke in there in one of the pictures; and on coming back, they had removed one post for some reason.

Q. So they constructed it along the extremity which is shown on the western portion of the area marked in yellow, is that correct, sir, in general? A. In general, yes.

Q. Now, the record discloses that on July 30, 1963, the defendant Ishee acquired title to Lot 849. In the event that the gates which were taken down and fences and posts pursuant to the temporary restraining order were re-erected on the west line of this Lot 849, would that obstruct the free use of the garage facility which you now utilize? A. Yes, certainly. You couldn't get in.

Q. Now, Mr. Boswell, you have been very close to the people involved in this case over your entire lifetime, you state. Have you ever heard anything in connection with permission from any of the properties, from Ishee or any predecessors entitled to Ishees in connection with this use of this right of way? Have you ever heard anybody say or do you know of any fact that would indicate that any permission was obtained from Ishee to use the right of way? A. No. I thought it was past history as an alley.

MR. WILKES: No further questions.

CROSS EXAMINATION

BY MR. WAGMAN:

Q. Mr. Boswell, you were familiar with that whole area, then, prior to 1924, were you not? A. I think so.

Q. Do you recall what was there to the rear of the houses on North Carolina Avenue and to the rear of the Ishee property in 1924 before the garages were built? A. There was land there, but the fence at that time of the Ishee property was over to the apple tree or pear tree, whatever it was. There was a space in between there.

Q. A pear tree? A. Some fruit tree.

Q. The pear tree was very close to the property line between the two properties, was it not? A. It was close to the fence line. I didn't say property line.

THE COURT: What was it that you asked him about?

MR. WAGMAN: There was a pear tree, Your Honor, very

close to the fence that existed prior to the erection of the garages.

BY MR. WAGMAN:

Q. Is that correct? A. Yes.

Q. And that fence ran east and west, did it not? A. East and west, yes.

Q. And that fence was between the Ishee property or the property which is now owned by the Ishees and the property on North Carolina Avenue, is that correct? A. There was a fence. I assume that the fence was on the Ishee line, and there was a space between the fence and the other people.

THE COURT: Where was this fence with respect to that yellow area?

THE WITNESS: The fence with respect to the yellow area would have been to what I interpret from here would be the north line of the yellow area. Does that answer your question, the north line?

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THE COURT: Yes.

BY MR. WAGMAN:

Q. Was that the fence prior to the erection of the garages? A. As I remember it, there was a fence there and there was a space there, and that fence wasn't Ishees, whoever lived there then.

Q. Did you ever know a Mr. Lee Walsky? A. I never knew of him, no.

Q. After the garages were built, was there a fence between the right of way and the property there? A. As I recall, there was a fence on the north side of the yellow strip.

Q. Was that the same fence that existed before the garages were built? A. I couldn't say that.

Q. In other words, it is entirely possible that there had been a fence on the south line which was taken down when the garages were built and that a fence was then erected on the north line? A. You said that. I didn't.

Q. But it is possible, is it not? A. Anything is possible.

Q. You don't remember -- A. I am not going to put down your words, because it is not clear in my mind.

Q. Now, you had occasion to use that right of way and the garages after they were completed, is that correct? A. Yes.

Q. Do you recall how wide that space was? Was it just twelve

feet wide or was it wider? A. You could turn a car around easily. I didn't have a license until I was older. I was in a serious automobile accident when I was young, and I didn't get a permit to drive a car until I was 28. And the first car I had I put in and out of that garage, and I wasn't the best driver; and I made it all right.

Q. What kind of a car was it? A. A Ford.

Q. What year? '37, I guess.

Q. Now, these garages were set back from the rear property line, were they not? A. That is right.

Q. Do you know how much of a distance that was? A. Well, I don't know the exact measurement, but as they went up the street, they set back farther. I can see that there. But I don't know what that space measures there on the scale. They were set back. I think it was a matter of choice.

Q. A matter of choice. In fact, that made the garages much more useable than they would have been if they had been built right up to the property line, is that correct? A. I should think so, yes. It has been done before. We built our stable on G Street for a horse, and we brought it back off the line. And that part that is not paved by the alley is still our own line. We put things on it because we owned it. But when the stable was rebuilt, it was an old building torn down and rebuilt it and brought it back in; and we have a delightful broad alley just as a matter of choice.

Q. Now, that right of way was paved, was it not? A. Black top, yes.

Q. Was it black top in those days? A. Where the garages had been done, yes.

Q. And were the driveways into each garage also paved? A. The driveways have a slope, slopes a bit, and they are in concrete, like a strip, I don't know how many feet.

Q. Now, the driveway strips were concrete and the right of way was black top, you say, is that correct? A. They extended the garage floor out a reasonable distance to make it smooth. What the space was, one foot, two feet, or three feet, I can't recall, and over a period of driving some of it has broken. So it may not appear as it had originally.

Q. In effect, that increased the width of that right of way,

then, to approximately twenty feet, is that right? A. It naturally made the right of way wider there, yes.

Q. As a result of that increase in width the right of way, plus the additional land there, flowed right into the alley so that it looked as if one continuous road, is that correct? A. Yes, one alley ran into the other.

Q. Do you know who paved that right of way? A. No, I don't.

I 136 Q. Now, do you know when the gate was put into the fence at the east property line, the fence that was to the rear of the Folger Apartments? A. Well, I think that Mr. McCray was the first tenant or his daughter Harriet was the first tenant in the Breuninger garage. As soon as the garage was built, I think the McCrays were the first tenants for the garage, and that was shortly after late 1923 or early 1924.

Q. Now, they used that garage or they rented it then until about 1937, did they not? A. Yes.

Q. Do you know where the services were in the Folger Apartments during those years? A. I had been in the building when the McCrays lived there. Then later I went in the building for an auxiliary appraisal for Perpetual Building Association, and the downstairs of the building had been the basement which had been a cellar which had been converted into a number of apartments; but I don't know just where the furnace room is, as I remember.

I 137 Q. Now, when the gates were put up by the defendants across the width of the right of way, the west end of the right of way, in August of 1962, you were not deprived of access to the garage, were you? A. It would have been difficult to have driven a car into the garage. I would drive up and park my car. I couldn't park it where I normally had parked it, because Mr. Ishee or his agent had put up the fence, but I could park my car and open the little door and walk in.

Q. Where had you parked ordinarily? A. Right in the alley.

Q. Right in the driveway in the right of way, is that correct? A. Sure.

Q. Now, you did not use the garage for parking at that time, did you? A. No. I had not used it, not to put the car in and out, no.

Q. Did you ever try to get it into that garage? A. Since the fence?

Q. Before the fence? A. Certainly I had in bad weather. The car had at one time belonged to my sister who took very good care of it, and she would put it in that garage to take care of it.

Q. During August of 1962 to the period of May or June, 1963, what did you have in that garage? A. I had in that garage a mantle, mostly marble mantles of good quality which I had to take care of to use when I wanted. And my brother had some he collected. I used the mantles in my business.

Q. So you used it as a storage place? A. Yes. And I also used it as access to go to that house to visit my cousin. I went in and out the back way to the garage.

Q. So that the only inconvenience, then, that the gates caused you while they were up was that you could not park in your accustomed place in the right of way, is that correct? A. I just parked down the alley. I thought it was a foolish thing to have a fence there. I will answer your question directly. The only inconvenience it gave me is that I didn't park in the exact same spot. Does that answer it?

Q. Yes. A. If I weren't in there, she would probably have someone else in the garage using it.

Q. Isn't it a fact that you had a conversation with Mr. Ishee prior to the erection of those gates in which Mr. Ishee had asked to place a post between the garage owned by Mrs. Grigsby and the one owned by Mrs. Connor so that a gate could be strung across the entire west end of the right of way? A. You will have to rephrase that. It is confusing.

Q. Do you recall a conversation in which Mr. Ishee discussed with you the putting up of a gate across the right of way and the apron? A. He had no right to discuss it with me. What did I have to do with it?

THE COURT: He is just trying to find out from you whether you had a conversation.

THE WITNESS: I don't remember any conversation of putting any gate up. I do know that a post was removed. As I said before, another post had been there in the alley which had been re-

moved there the first morning.

BY MR. WAGMAN:

Q. Now, the post that was in the center would have blocked the-- . A. Yes, I-- .

Q. The post that was in the center that was removed would have blocked the Grigsby garage, is that correct? A. That is right. One-half of the Grigsby garage.

I 140 Q. When it was removed, there was no post then blocking the Grigsby garage, is that correct? A. One post released one-half of the Grigsby garage. The Grigsby garage is a double garage for two cars. It is wider than the other garages, I think, because it has double doors; and two cars can get in there; and had been in there; and you could not use the entire garage with the posts as they are.

Q. Did you try? A. No.

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DOROTHY GRIGSBY WINTERS

was called as a witness for the plaintiffs and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WILKES:

Q. State your full name, please. A. Dorothy Grigsby Winters.

Q. And where do you reside now? A. At 418 Tyler Place, Alexandria, Virginia.

Q. Are you related to any of the parties in this case? A. Yes. I am the daughter of Dorothy Grigsby, Dorothy Breuninger Grigsby.

I 141 Q. During any part of your lifetime, did you reside at premises 160 North Carolina Avenue, Southeast? A. Well, I visited there twice a year from the time I was born up until 1937, at which time I moved there, from '37 until 1945.

Q. Do you have a clear recollection of the time when the garages were actually put up back in 1924? A. I don't remember the garages going up.

Q. When would be your first clear recollection of the situation? Let me ask you this, with respect to 1937 when you actually moved in there and through 1945 when you moved away, do you have a clear recollection of that period of time? A. Well, I just always remember the garages having been there.

Q. Yes. A. I don't remember before then.

Q. During that period from 1937 to 1945 when you lived there, was the area in yellow marked on Plaintiffs' Exhibit No. 1, which is to the rear of the rear lot lines of the five houses now owned by Grigsby, Connor, Connor, Schreiber, and Horton, and colored in yellow, used by those persons and the apartment building for general alley purposes? A. That is right.

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CORNELL LONG

42 was called as a witness for the plaintiffs and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WILKES:

Q. State your full name, please, sir. A. Cornell Long.

Q. And where do you now reside, sir? A. 411 Second Street, Southeast.

Q. Are you the janitor at that premises part time or custodian there? A. Yes, I am.

Q. Are you working for Mr. Gruis at this time? A. Yes, I am.

Q. Was there ever a time when you lived at premises 149 D Street, which is now owned by Mr. Ishee? A. I did.

When was that, Mr. Cornell? A. It was in '54 - from mid-54, I would say, until about mid-55 until I went in the Navy.

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43 Q. Now, during that period of time, were trash and garbage collected with respect to the Folger Apartments now owned by Mr. Gruis and where you now work through the public alley and up to the area marked yellow on Plaintiffs' Exhibit No. 1? A. There was trash collected there. I don't recall precisely whether it was collected from the Folger, but I do remember the trash truck coming up through that alley there. They used to pick it up from the rear there at 149.

Q. They picked it up from the rear? A. Right.

Q. And during that period of time, was there also access by foot for the tenants who lived in the Folger Apartments? A. Yes, it was, because quite frequently we used to travel up the alleyway into our house. I had some more friends who lived at that time in

the Folger, and we used to travel through that alleyway quite frequently.

Q. Now, when you lived there at that time you were a tenant of Mr. and Mrs. Ishee, is that right? A. I don't know whom my mother was renting from. I don't recall that. I can't very well say who my mother was renting from.

I 144 MR. WILKES: If your Honor please, I would like to refer at this time to the deed which is in record to Tommy C. and Maryclaire Ishee, dated November 30, 1951.

MR. WILKES:

Q. Now, Mr. Long, were you there at the time the Ishees put up a fence right across this gate in the form of two posts and chicken wire? A. Yes, I was there. This happened around some time in March or April, I believe it was. I was there at that time.

Q. Of what year? A. This was in '63, of this year.

CROSS EXAMINATION

BY MR. WAGMAN:

Q. Mr. Long, when were you first employed as the custodian or janitor at 411? A. I was employed there in April, the early part of April.

Q. The early part of April of this year? A. Right.

I 145 Q. At that time was there a fence at the rear of 411 with a gate in it? A. Yes, it was.

Q. It was already up? A. Right.

Q. Directing your attention to the year of 1954 and 1955 when you were living in 149 D Street, Southeast, was there a fence towards the rear of that property? A. Not to my knowledge, it wasn't.

Q. How was it at that time? A. It was free, as I recall, because we were able to come down from the kitchen in 149 right down the side step there and come out through the rear to the alley and go down the alley.

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EDWARD G. GRUIS

one of the plaintiffs, was called as a witness for the plaintiffs and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

46 BY MR. WILKES:

Q. State your full name, please, sir. A. Edward G. Gruis.

Q. And where do you reside? A. 326 Second Street, Southeast.

Q. Where is that in relation to the Folger Apartments now owned by you, Mr. Gruis? A. It is at the northeast corner of the intersection of D and Second Street, Southeast.

Q. In other words, it is directly adjacent to this corner of Second and D? A. That is correct.

Q. And how long have you resided at that location, sir? A. Since April or May of 1955.

Q. And what is your occupation, sir? A. I am an attorney with the Federal Trade Commission.

Q. Now, did there come a time when you became interested in the premises 409 to 411 Second Street known as the Folger Apartments, and, if so, state the circumstances, please, sir? A. The Folger Apartments, prior to its acquisition by myself and four other people at that time, was at most a tenement. It was in pretty rough shape. We had a rather low tenancy type of relationship there; and at that time I talked with several people in the neighborhood as to whether or not in an endeavor to help the neighborhood and our own personal plots and investment, too, we discussed the feasibility of going in and buying that. This was sometime in 1960. Towards the latter part of 1960. I had contacted the people and had gone over the building in an effort to attempt to syndicate its purchase. I had contacted several people in the neighborhood, including the defendant, and also Mr. Krizek who is also sitting at the plaintiff's table. This was during the months of October, November, and December.

I finally did acquire and take title on behalf of the syndicate to the building. I believe it was on January 31st settlement was, 1961.

Q. Now, Mr. Gruis, I show you what has been marked as Plaintiff's Exhibit No. 26 for identification, Plaintiff's No. 25, 26 and 27 for identification--

* * * *

Q. -- and ask you if this is a fair representation of the front of that building at that time. A. At the time I acquired the

property this is what the property looked like.

Q. Did you additionally inspect the rear of the property at the time you purchased it, sir? A. Yes. In attempting to put this package together, people would be interested as to what the building was and what it looked like, and I think I took these photographs which showed the back of the building at that time.

* * * *

Q. Now, is this the photograph that you took which showed the situation-- ? A. The back of the apartment house, yes, sir.

Q. At that time, what was the situation, describe it, please, as you actually looked straight up the public alley towards the back of the apartment house which you purchased? A. Well, both of those pictures were taken, I believe, around March or April of 1962.

I 149 At that time I was attempting to procure sufficient construction money to renovate the building. These pictures were made part of the package that was submitted to the financing people to consider whether or not they would advance construction money for this. At that time I also spelled out, one of the pictures was taken from down the alley that looked up the full sweep for approach to the alley. It was wide open, and it looked just like it was part of the public alley running right up to the apartment building line. It was just the conventional public alley type of approach.

Q. Subsequently, did you proceed with the renovation of the building? A. Yes, sir, I did. I cleared the building, and I started clearing it in October of 1962; and the building was cleared in November of 1962; and the contractors had already started to work.

Q. I show you what has been marked as Plaintiff's 25 and 27 and ask you if they are fair representations of the side of the building subsequent to your restoration? A. Yes, they are.

Q. How much money did you spend on that restoration, Mr. Gruis? A. Approximately \$72,000.

I 150 Q. Was that over and above the cost of the --? A. This was \$72,000 for restoration. That was over and above the cost of the building, yes, sir.

Q. Subsequent to the date of your purchase, did you continue to use the right of way which is the area colored in yellow and the rear twelve feet of Lot 849 in question in connection with any use

of the Folger Apartments? A. When I acquired the property, or more correctly, I mean, when my group acquired the property, I was the figurehead, so to speak, we continued almost exactly the same services that my predecessor in title had there, including the trash removal, the trash services, oil delivery, service deliveries, minor renovations in the building in so far as fixing the plumbing or something like that; and we would prefer for those service people to come in through the back, yes sir; and that was continued right up until it was interfered with when this suit was brought, sir.

Q. When you took title to the property, do you know anything about the number of people who lived in the apartment house? A. Well, as I indicated earlier, the building itself was pretty much of a tenement before renovation. I can give one illustration. While I had a property manager, in many instances I did not know who the tenants were that were living in the building. I do know on one occasion an apartment had been rented to an occupant on one of the first floor apartments. I got a notice from the District telling me that there were six people too many in here and that we had to get it out, that the floor space under the Code regulations was inadequate. I had no knowledge about how many people were in this building because of the nature of the tenancy at that time. There were an awful lot of people.

Q. You then gave notices to quit after your financing was obtained and proceeded for the reconstruction? A. That is correct.

Q. As a result of the reconstruction, are there more or less or substantially more or substantially less numbers of people who now occupy the Folger Apartments as renovated? A. There are still sixteen units, but several of these units are occupied by single people. I think we have one child in the building. Otherwise it is a husband wife or two girls or a single fellow or a single girl throughout the entire building.

Q. Now, did there come a time when fences were erected by the defendant? A. Yes, sir. Along about mid-August of last year, I was summoned one day. I don't recall who did it just now. It might have been Cornell, our custodian of the premises, or it could have been one of the property owners along North Carolina Avenue.

Q. And what did you observe, sir? A. That a barricade or

fences were put up across the easement or right of way in the back of the apartment buildings.

Q. Then did there come a time when an additional fence was constructed or wiring that affected you? A. Yes, sir. This condition of fences existed from August of last year until, I believe, sometime in perhaps early April of the present year when a post and chicken wire mesh fence was set directly across my access gate in the rear of my new stockade fence so that I couldn't get in or out of the gate. I believe that was the reason we contacted our attorney to have suit brought for a temporary restraining order at that time.

Q. When the gates were put up in August of 1962, did you retain counsel in connection with an attempt to get that fence down?

A. Yes, sir, I did. With the rest of the party plaintiffs here we met and we decided that this was a common problem. We all had our own personal interests in this, but this was basic to our, to all of our properties; and we employed counsel to see what could be done about removing this obstruction in the back.

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Q. I show you what has been marked as Exhibit No. 29 and ask you if this is the wire across the gate at the rear of your property that was erected by the defendants Ishee as you have testified. A. Right. What appears to be like a shadowing effect here is really a chicken wire mesh that was just secured tight to posts resting -- I am not sure whether they rested right against the fence post or whether there was just a small clearance in there. A person or nothing could get in or out without breaking those fences down.

MR. WILKES: If Your Honor please, that is taken right up against the chicken wire and the chicken wire detail is very vague and in the foreground and covers the entire gate area of the photo.

BY MR. WILKES:

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Q. Mr. Gruis, where is the fuel oil pipe that serves this building? A. Could I point it out on the illustration?

Q. Yes. Step down to Exhibit No. 1, please. A. The furnace room, this is on the first floor in the basement, an apartment, this area right in here (indicating) and just behind that, there is the furnace room that is located right in this area here (indicating); and the fuel line to take in fuel or storage, our storage tank is

built on the inside of our furnace room, and the fuel line comes out to the edge of the porch here (indicating); and, usually, our fuel oil truck pulls right up to here (indicating) and runs the hose right into here into the fuel oil line that brings the fuel into the apartment.

Q. That fuel oil is used for what purposes? A. For heat and for hot water. We have an instantaneous hot water system that does not operate off a tank; I mean, it is one of these types that operates in connection with the furnace so that there is no storage hot water facilities. It is run in connection with the furnace. I am not an engineer. Anyway, there is no huge tank for hot water storage.

Q. Mr. Gruis, have you examined the title with respect to your apartment house for the purpose of determining whether there is any other right of way in connection with access to the street from the rear of your building? A. Yes, sir, I have.

Q. Is there any such right of way? A. There is no other right of way.

Q. Have you made an investigation to determine whether, with the exception of the right of way area involved in this proceeding, the area in yellow and the rear twelve feet of Lot 849, there is any other access to the public street from the rear of the Folger Apartments with respect to use by owners and tenants and occupants of the Folger Apartments over the years in so far as you have been able to determine? A. There has not been.

Q. Have you ever sought or obtained permission from Thomas C. or Maryclaire Ishee to the use of the right of way involved in this proceeding? A. I have not.

* * * *

CROSS EXAMINATION

BY MR. WAGMAN:

Q. Mr. Gruis, how long have you lived in that neighborhood? A. I testified earlier since 1955.

Q. '55. Have you been familiar, then, with the Folger Apartments? A. I have on occasion been over that area, yes, sir, during this period of time.

Q. And you say you purchased or the syndicate purchased the apartments back in 1960? A. No, sir. I believe I said January

of 1961.

Q. '61. And how long did you work on getting up the syndicate for purchase there? A. Approximately three or four months. I am not sure.

Q. Did you investigate the entire building very carefully? A. I had not been through each apartment. I had been through parts of the building, yes.

Q. Had you examined the rear and the alley, the right of way? A. Yes, I had been over that. I had been over that before I even considered buying it.

Q. Did you know prior to purchase that it was a right of way that was part of Lot 848? A. No, I did not.

Q. You didn't find that out then until after you purchased the property, is that correct? A. I didn't find that out until the suit was brought, yes, sir.

I 157 Q. And that was when? A. I believe the barricades were put up last August, and it was at that time that I began searching the question as to what this was all about and our counsel came into it and advised us of what our rights were.

Q. And you didn't find out that that right of way, the rear twelve feet, was property that belonged to Mr. and Mrs. Ishee until August 1962? A. The question never came up. I had very few dealings with the Ishees.

Q. Well, how long had you known the Ishees? A. Mr. Ishee was invited -- I think I wrote him a letter -- I have checked my correspondence files on this matter. I think I wrote him a letter some time in November of 1960 in connection with syndicating this property. I think he was at my home sometime shortly thereafter when we discussed the possibility of neighbors buying that building. Ultimately, well, we have four Government workers now and a person that works in the church that are the owners of this building. At that time it was an effort not only to clean up our own personal property but to clean up this, it could only be considered a blight at that time that appeared in our neighborhood. Yes, I did meet Mr. Ishee at that time, but the question of easement did not come up.

Q. You invited Mr. Ishee, then, to participate in this venture, this joint venture? A. Yes, I did.

58 Q. And this was done by letter, is that correct? A. It was an invitation, if you wish to consider it, to come over to the house, yes, sir.

Q. But it was a written invitation? A. I don't know. I think it was a letter explaining what I was trying to do, and I am not sure whether the letter said to come over to my house at a fixed time or whether or not I would contact you at some time in the future about getting together and talking about this.

Q. And what did Mr. Ishee then do? Did he join in the group?

A. No. There were, I think, five or six other people present when Mr. Ishee was there that afternoon; and like Mr. Ishee, all the other people wanted to consider this, too, because for small people this was rather an expensive undertaking.

Q. What did Mr. Ishee then do following that meeting? A. I believe Mr. Ishee advised me that he was not interested in joining our group.

Q. And how did he advise you? A. It is my recollection that he advised me by letter.

Q. And do you know what was in that letter? A. Yes, he was not interested in joining our group.

Q. And what else was in that letter? A. I do not know.

59 Q. Isn't it a fact that in that letter there was also a comment as to the easement and that there was not access? A. This question has been raised with me since this suit has been filed. I have checked over my correspondence very carefully. At that time there were several people who wrote me letters, some indicating interest and some indicating that they were not interested. Mr. Ishee was one of the letters along with several other letters expressing disinterest in this property. If you ask me what the contents of all these letters are, I do not know. I just know they were either with us or against us at that time in so far as putting this thing together.

Q. Will you identify this letter?

MR. WILKES: No objection, if Your Honor please.

BY MR. WAGMAN:

Q. Will you read it? A. I have read it. I can't testify to the truth or accuracy of this letter.

Q. You don't recall this as being a copy of the letter you received from Mr. Ishee? A. No, sir, I do not.

MR. WAGMAN: I would like to offer this as Defendant's Exhibit for Identification No. 11.

I 160 THE DEPUTY CLERK: Defendant's No. 11 for Identification.

(Copy of letter from Mr. Ishee to Mr. Gruis was marked Defendant's Exhibit No. 11 for Identification)

BY MR. WAGMAN:

Q. But if that letter is a copy of the letter you received, then there is a mention, is there not, of the fact that the access way to the rear of the Folger Apartments was, according to Mr. Ishee, a permissive use? A. Sir, I was not owner of the property at this time. I was merely trying to put together a group of people to buy this property. As I said, I received several letters. This letter may well have been received by me. I am not saying that I didn't receive such a letter. I am merely saying I know it was a negative letter, and I do not recall what the content is. Having read it now, I see it is pointed out in there that there is permissive use here. Again, that was not my primary concern at this time.

MR. WAGMAN: I offer these for identification, 12 and 13.

MR. WILKES: No objection to Defendants' 12 and 13, if Your Honor please.

I 161 THE DEPUTY CLERK: Defendants' Nos. 12 and 13 for Identification.

(Letters from Mr. Gruis to Mr. Ishee were marked Defendant's Exhibits No. 12 and 13)

BY MR. WAGMAN:

Q. Will you identify these documents, please? A. This is my signature. Both of these have my signature and my nickname, Ed.

Q. These are the letters that you addressed to Mr. Ishee? A. They are on my letterhead, yes, sir.

Q. In fact, these are the invitations, then, to join in the syndicate?

A. They are letters I sent to him indicating my interest in this property and what we were trying to do, yes, sir.

Q. When did you begin remodeling the property? A. In November of last year.

Q. November of last year. Had you ever had any discussion with

Mr. or Mrs. Ishee regarding the condition of the right of way and the traffic through the right of way from the apartment house prior to November of 1962? A. I recall one occasion, I believe, when I talked with Mrs. Ishee. I was coming up the alley from west to east. In fact, I was either out taking pictures or there was some discussion out there in the back; and she met with me at that time; and we discussed some of the alley problems. Let me put it like that.

Q. And when was this, if you recall, the approximate date?

A. It well could have been the early part of 1962. I am not positive of the date.

Q. And what was the gist of that discussion? A. Oh, perhaps some questions about what I can do to quiet the tenants in my building. As I understand it, I think that there was trash thrown out from some of the windows, perhaps. There were several problems, I think, that they were having in the back there.

Q. Was there anything said about automobiles being parked?

A. Yes, sir, there was.

Q. Was there anything said by Mrs. Ishee to the effect that if conditions didn't get better they would have to put up a gate?

A. No, she did not. What she told me at that time was what could be done about people parking in the back there. I told her I didn't know who was parking back there. I have already testified I didn't know the identity of many of the people living in the building. However, I did tell her and I told my associate to either pass the word along to their neighbors, if they have any problems, 63 I think that they should properly direct their calls to the Police Department.

Q. Is it not a fact that you knew that the Ishees claimed the right of way, your use of the right of way to be a permissive use prior to your purchasing the building? A. I did not.

Q. Did you ever have any occasion to discuss the use of the right of way with Mr. Ishee? A. Not with Mr. Ishee, I don't believe.

Q. Did you discuss it with Mrs. Ishee? A. Only on this one occasion that we were back there and there were several questions raised about what could be done about this. As a matter of fact,

that time I also advised her to please be a little bit patient, for little people it is awfully hard to go out and raise \$70,000, to go out and renovate a building, give me a little time, we will try to make a nice comfortable property in the back there for all the neighbors.

Q. Do you know why that chicken wire was put over the fence?

A. I have no idea, sir.

Q. When was that fence put up, the one that is now in between? A. The current stockade fence that is up?

164 Q. Yes. A. We put the new fence up, I believe -- you can't hold me to dates, because I had a contract on this project and I am not real certain as to time, because it was our agreement that he was going to handle renovation, but it is my recollection sometime in March of this year.

Q. When was the old fence torn down? A. It was torn down in pieces. I know I got a notice from the District of Columbia to either paint it, refinish it, or tear it down. I tore down part of it in response to that District notice at that time.

Q. When was that? A. I believe that was during 1962.

Q. And did you ask the consent of the Ishees before tearing that fence down? A. Of course not. The District instructed me to tear down my fence. That was directed at me, and I am not going out to solicit whether or not I can do this where there was an order apparently that the District was concerned about it.

I Q. Did you know on whose ground the fence stood? A. I 165 assumed it stood on my ground and still believe so, sir.

Q. Does it stand solely on your property? A. I don't know what you mean by solely on my property.

Q. Is it possible that a portion of the fence is on the Ishee property? A. That may be possible, yes sir.

Q. And is it a party line fence? A. This fence was put up by our contractor. The circumstances of this, when the contractor was out there he asked about this, and I told him to put it up on our property. I gave him instructions to put it up on our property. Now, he was out there in the back and put up this fence, and appar-

ently the defendants had a surveyor who came in and surveyed the back of their property. He instructed or advised me that he watched those surveyors; and after they ran their stringer, he constructed a new fence well within inside the stringer that they put along there.

Q. Isn't it a fact that the contractor actually moved the fence that he was building for you a foot towards your property because of the conversation that the contractor had with Mrs. Ishee?

A. This I don't know, sir. Again, at this time we weren't trying to hurt anybody in back there. We don't want anything that is not ours. That contractor put that fence up, I am sure, with an effort to try to accommodate all the people that were involved. All these properties hug each other in the back there. We have a mutual interest trying to keep it clean and a decent, respectable place to live. In the same regard, I worked with Mrs. Horton. We have identical fences. I think Mrs. Horton at the time I got the notice for the rear fence to tear it down or paint it or repair it, I think it was to repair and paint it or tear it down, the way the District notice read -- this was also true of our mutual line running along the Horton property which, I believe, is 176; and at that time I got together with Mrs. Horton about tearing down that old fence to put it back in the same type of stockade fence all the way around the back there to beautify the whole area generally.

Q. Did you have a permit to put up that new fence? A. I don't know. My contractor did the work on that. I have subsequently found out that there was a license or a permit issued for the construction of that fence, yes, sir.

Q. Do you know when it was issued? A. I don't know. I believe we have copies of it.

Q. Now, the rear of your building was exposed, in other words, there was a fence down for a period of about three or four months, was it not, before the new one came up? A. Parts of it were, yes, sir, that is true.

MR. WILKES: If Your Honor please, may I interpose one question at this time? Are we now going into a trial on the counterclaim?

THE COURT: Well, no. I thought this cross examination was just responsible to what you had brought out on direct examination.

MR. WILKES: If Your Honor please, that is my objection to his line of questioning at this point. He is going beyond the scope of the direct examination, and he is going to the issue as to the counter-claim. It was my understanding that there would be an opportunity for an opening statement and a motion at that juncture. Now, if he desires to get into the question as to the location of this fence, but not the tree, I would have no objection to his proceeding along that line of testimony and let it be considered on the counterclaim in connection with the removal of that particular fence.

THE COURT: Do I understand you to say you have no objection to going into the matter of where the fence is built but you do object to anything about the tree?

MR. WILKES: That is correct, Your Honor. These are two separate aspects of the counterclaim.

THE COURT: He hasn't testified about any tree.

MR. WILKES: Very well.

BY MR. WAGMAN:

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Q. During the period of time that the fence was down, was the building in the course of remodeling? A. Yes, sir.

Q. Was the rear of the building open to the alley at that time?

A. What do you mean by that, sir?

Q. Was it open to the alley? Was it accessible from the alley?

A. The rear of the building or the rear of the property?

Q. The rear of the building and the rear of the property, both.

A. I believe the contractors closed the building up usually at night.

THE COURT: You said, I thought, that this fence was taken down in stages. Did you say that?

THE WITNESS: Yes, ma'am.

THE COURT: Well, then, the new fence, was it put up in stages?

THE WITNESS: No, ma'am. That was put up all at once.

THE COURT: Well, do I understand from what you say that

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169 sections of this fence were down and other sections were standing? Is that what you are saying?

THE WITNESS: Yes, ma'am. If I may, Your Honor. At the time we received notice, this involved these fences running

from here all the way up over around to here. (indicating).

THE COURT: Yes, I see.

THE WITNESS: Now, this fence, Mrs. Horton and I received notices on to take down immediately. So this was torn out initially.

THE COURT: Just one moment. That first fence you are speaking of isn't one that bordered on the land of the Ishees at all?

THE WITNESS: No, ma'am.

THE COURT: All right, go ahead.

THE WITNESS: And then later on there were other sections of it such as over here that were taken out or repaired. In the meantime, parts of this had been taken out, I believe the gate had been taken off so that some of our contracting people could come in; but still, at that, there were pieces that had to be taken down when our contractors were there.

BY MR. WAGMAN:

Q. When was the section of the fence that bordered on the Ishee property taken down completely? A. I do not recall.

Q. Over how long a period of time? A. Maybe a month.

Q. But before it was fully taken down, from the time the gate came off to the time the entire fence was taken down? A. That is possible, yes sir.

* * * *

Q. And how long an interval of time was there from the time the gate was first taken down and then the rest of the fence followed? A. Are you asking me now when the gate came off the fence or when the fence was taken down?

Q. When did the gate come off the fence? A. It seems to me it was sometime early in the spring of 1962.

Q. Early in the spring of 1962? A. That is correct.

Q. And do you know--? A. Now, which gate are we talking about, we are talking about the gate onto the right of way? Q. Onto the right of way. A. Right.

Q. In the spring of 1962. Do you know what caused the gate to come down? A. No, sir, I do not.

Q. Do you know who took the gate down? A. I do not, sir.

Q. When did that portion of the fence which boarded on the property of the defendants come down? A. Well, I believe I testified yesterday that part of the fence came down in pieces, first the gate came, then I think there were perhaps one or two boards were taken out for our contractors to get through, and then I think the rest of it was removed.

Q. When were those boards taken out? A. Perhaps sometime in the fall of 1962.

Q. That is when you started remodeling, was it not? A. No, I believe the boards, it is possible that one or two of the boards had been removed just prior to remodeling, in other words, to make way for the material to come in.

Q. And was it not a fact that the defendants had requested that that gate be put up, after it came down in the spring of 1962?
II 175 A. Requested who, sir? Not me.

Q. You or your agent on the premises? A. Not so far as I know, sir.

Q. Isn't it a fact that the defendants put up those gates -- that gate, a number of times before it disappeared permanently? A. I have no knowledge of that, sir.

Q. Did you have any conversation or communication with the defendants, pertaining to the right of way, after August of 1962? A. I don't believe I talked to the defendants personally, I believe our lawyer communicated with the defendants.

Q. Did you have any correspondence with the defendants regarding that right of way? A. You mean correspondence from me or correspondence to me?

Q. Say correspondence to you? A. I believe I received a letter sometime in December concerning that particular right of way, yes, sir.

Q. What was in that letter, if you recall? A. It is my recollection that the letter said something to the effect that the right of way or my use of the right of way was being revoked, pursuant to a purported license of the defendants.

III 176 THE COURT: It was being revoked pursuant to what?
THE WITNESS: A purported license of the defendants that was given to me.

BY MR. WAGMAN:

Q. To your knowledge, were the services to the apartment building at that particular time halted in any way? A. Sir, at that time the building was in the process of being replastered. I got a desperate call from my contractor one night saying, "Mr. Gruis, we are spending ten thousand dollars on plaster in this building. Now, we can't let this property freeze because it will completely ruin the new plaster that is being put on."

For this reason, when our fuel trucks came up, to insure that that building would be heated, I did tell them to go ahead and put the fuel in the building, over the right of way, yes sir.

Q. But there was no interference with the fuel trucks, so far as you know? A. Not insofar as -- let me put it this way. The first time the fuel truck came up and they saw the gates closed, they told my janitor, I believe, who came over and reported to me, that they could not get in. They went back and did not deliver the fuel the first time.

I had to call the next day, I believe it was Griffith Consumers, to tell them to come out and go through the gates to put the fuel into the building.

Q. You don't know whether they tried to go through the gates, do you?

A. I do not know that, of my own knowledge. They told me -- my janitor had advised me that they did not go through them.

Q. Had there been any cessation of services through the right of way prior to December of 1962? A. My trash people did notify me that with the barricades up, they could not get through and pick up the trash. However, this was during the period the building was undergoing renovation. While it was undergoing renovation, we dispensed with our trash removal services, because the contractor had the obligation to remove all debris on the premises.

Q. Now, what do you mean they couldn't get through the barricade? A. I am simply saying that the trash people came up and they saw these gates closed to their ingress to the property to remove the trash receptacles at the back of the building and they didn't know what it was all about and they just said there are fences or gates closing us off.

Q. Isn't it a fact that they did go through those gates and they proceeded to go through them and pick up the trash? A. Yes, sir, that was immediately prior to the temporary injunction, when we resumed our services with the trash removal people and the building was again occupied by tenants.

II 178 Q. During the time from November until about -- when did you finish remodeling the house? A. Sometime in, I believe it was in April.

Q. April. So that from the time of November to April, there were no trash removal services, is that correct? A. No, sir, from about December until April.

Q. December til April. Prior to December, between the period of August to December, did you have trash removal services? A. Yes, sir, we did.

Q. And they were in a constant -- in the usual manner, how often did they pick up? A. Now, not in the usual manner, sir. Again I say that it was only after they came and called me --

Q. When was that? A. Well, in August, when the barricade was originally put up.

Q. But they were then instructed to go through the gates? A. I advised them to go through the gates and pick up the trash, yes, sir.

Q. And there was no interference on the part of the defendants with the trash removal services? A. Not at that time, no, sir.

II 179 Q. Was there ever any interference on the part of the defendants with the trash removal services? A. Not with the trash removal service, no, but there was with our contractors.

Q. Was there any interference with the fuel deliveries? A. Not after that first occasion when they came up and could not put the fuel in and I had to call them back and tell them to go through the gates, to insure that the building was going to be heated.

Q. And what was the interference with the contractors? A. The contractors, some of the workmen on the premises advised our contractor, who in turn called me and said that the people to the rear of your property do not want those people bringing their building materials and boards, and so on, through onto the property for their renovation work.

Q. Isn't it a fact that the contractors and the workmen were parking their cars back there and parking it off the right of way on the property of the Ishees? A. This I do not know, but it is possible.

Q. Isn't it a fact that the workmen, in removing the old materials from the building, piled the debris off the right of way and on the property of the defendants in this case? A. No, sir. It is my recollection that the refuse was taken out of the building, during the building, for the most part, and piled on that little white section outlined by green, behind the parking place. However, because of the way the building is laid out, with approximately eight units in the back and eight units in the front of the building, I had been advised that the proposition was much more expensive to take all of the refuse and materials from the back of the building, which could have been thrown out the window in the usual way this was done, to haul this through the building out the front door where they had to get parking permits to put their trash removal services out in front, and pile it on the front lawn.

Q. Isn't it a fact that some of the workmen built bonfires on some of the property of the Ishees? A. This I do not know, but it is possible during the winter, yes sir.

Q. On the property of the Ishees? A. This I do not know.

Q. Were you aware that one of your contractors left scaffolding on the right of way for a period of ten days during -- A. I do not know, but that is possible. I think, one thing with the scaffolding, scaffolding are usually long boards ten to fifteen foot long, I believe, and I think the largest -- I did notice on one occasion the major portion of this board was laying on my property but approximately two or three foot of that did extend out over onto the easement right of way.

Q. During that period of time, the winter of 1962-63, from November to April or May, this area was open, was it not, the fence had been removed? A. No, sir, I didn't say that.

Q. When was that fence fully removed? A. I said the fence was fully removed, it had been removed in pieces, I think, between December and in March the last remnants of it were taken down and we put in a new fence. See, what happened actually, there was a

gate there and that gate was enlarged originally to bring the materials through. When the defendants began to interfere or object, or whatever you call it, with the contractor and his people in bringing these materials in, from then on they started moving them all from the back, but it is very possible that scaffolding was stacked in the yard on the back which did extend over onto the easement area.

Q. Did you advise the defendants that you intended to enlarge the gate? A. No, sir, I did not.

Q. Did you advise the defendants that you intended to take down the fence? A. This is again -- the District Government told me to take down my fence.

Q. Isn't it a fact that that rear portion of the fence was fully down by December of 1962? A. No, I believe there were still pieces of that fence standing.

II
182 Q. What kind of pieces? A. Towards the edges, in other words, if the gate was enlarged, it was probably enlarged still more to bring through the materials that had to come onto the property for renovation.

Q. How wide an opening would there by, then, in December of 1962? Let me rephrase my question. From the south end of the property line to the north end of your property line, there is a distance of twenty-five feet? A. Approximately, yes, sir.

Q. How many feet of fencing remained in December? A. Now, exactly, I can't say, sir. It is my recollection that most of the fencing in the easement area had been removed. I believe portions of the fencing around the northwest corner of my property were still standing.

Q. And how many feet would have been there then? A. I do not know, sir.

Q. Then in December, the fencing that existed behind the right of way was definitely out, was it not? A. I believe most of it had been taken out.

Q. And a portion of the fencing beyond the right of way had been removed, had it not? A. It well could have been, yes, sir.

Q. Was any provision made at all to block off the rear of your property from the right of way and the Ishee property, when the

contractors and the workmen were not working in the building, during those hours when they were not there, during the period of remodeling. A. Insofar as I know, no, sir.

Q. Then it was left wide open all the time they were not there, is that correct? A. Sir, you keep using this expression, "Wide open." The building in the back, there were doors on all the units, for the most part, the stairs were still there. Children still get onto our property, ran up and down the stairs; now this is something I can't prevent, reasonably. If you say the full back of our building was exposed insofar as the gates and fences being down, I have to agree, to the extent they were down.

Q. And your building has an open stairway in the rear, does it not? A. It does; it still has an open stairway.

Q. Which extends from the first to the fourth floor? A. This is true, sir.

THE COURT: At this period that you are talking about, was that fence up, that was at one time between the right of way and the Ishee property that is not subject to the right of way?

THE WITNESS: No, ma'am, I do not believe so. I believe when the barricade was put up, the defendants had extended their yard to the far line, the far south line of the easement, so that there was just one great big yard in the back embracing the easement as well as their normal back yard area.

BY MR. WAGMAN:

Q. Mr. Gruis, at the time you purchased Lot 46, did you know who owned Lot 848? A. The defendants' property? Yes, sir, I did.

Q. You knew the Ishees? A. Well, I contacted them, I told you, by letter and invited them to join me in buying this property.

Q. Did you know who owned Lot 849? A. I could have, but I will not say I knew the people.

Q. Lot 849? A. Yes, I assume that 849 is that eight-foot strip?

Q. That eight-foot strip. A. No, I did not.

Q. Isn't it a fact that even though you were advised by Mr. Ishee in December of 1960, prior to purchasing, that the right of way back there belonged to him and that it was a permissive use, you believed it to be a public alley, did you not? A. Sir, you

have said this, I have said I have no recollection of this. At the time that I inspected this property, sir, you can go down, as some of our pictures show, and stand in that red portion and look straight up that public alley and it appeared that that public alley, the section between where the red part stops and the part at the end of the Folger property, was an unimproved part of the public alley, that's what it appeared, yes, sir.

II Q. As far as you were concerned, it was a public alley, is
185 that correct? A. So far as I was concerned at that time, yes.

Q. You didn't know that the -- you testified that the land belonged to the Ishees and it was subject to an easement or right of way? A. Sir, I had no interest in this land back there at the time. My concern was in the building and it had all the appearances of a right of way or public alley through there, these services had been used, I had witnessed it over a period of time. I was not inquiring who owned different pieces of property or what the respective rights of all these people were down the alley.

Q. Now, do you know how long the services had been offered to that building through there, through the right of way? A. All I know is when my services started, when I took over the property, sir.

Q. But those services had been in existence, to the best of your knowledge, prior to that time? A. I have heard here during this proceeding that they have been.

Q. In what way did your services differ from any of the services given to the other plaintiffs in this action through that right of way? A. I don't know, sir.

II MR. WILKES: If Your Honor please --
186

THE COURT: Well, he has answered that he doesn't know.

THE WITNESS: I don't know what the prior services were, so I can't compare them.

THE COURT: Just a minute, you have said you don't know, and that is a sufficient answer.

BY MR. WAGMAN:

Q. Do you know what services have been received by the other plaintiffs in this action through the right of way since you have purchased Lot 46? A. Yes, I recall occasions where I have seen garbage and trash pick-ups through the alley. I have seen other

members, as a matter of fact I didn't even know some of their names, but I have seen ingress and egress to their properties, whether or not they were the plaintiffs or their guests or visitors, I do not know.

Q. They have received trash and garbage service through the--
A. I have seen trash pick-ups or garbage pick-ups in the back, yes, sir.

Q. And to the best of your knowledge, they have received fuel deliveries through the rear, have they not? A. This I am not so certain of.

I
187 Q. And they have used the right of way for-- A. Someone has used it and I assumed it was the public.

Q. --ingress and egress? A. Yes, sir.

Q. From whom did you purchase the property? A. I purchased from, I believe it is Mr. and Mrs. Reed Liggitt.

Q. Do you know whether or not they ever knew that the alley to the rear of their property was a private right of way? A. At the time of purchase--

THE COURT: Just a minute. Does he know if they knew?

MR. WAGMAN: If they knew.

THE WITNESS: I don't know.

THE COURT: I don't know how he could know what they knew.

MR. WAGMAN: I will rephrase the question, Your Honor.

BY MR. WAGMAN:

Q. Did you ever have any discussion with Mr. and Mrs. Reed Liggitt, or their agents, concerning the right of way to the rear of the property? A. I did not.

MR. WAGMAN: No further questions. May it please the Court, I have one or two other questions.

THE COURT: Very well.

BY MR. WAGMAN:

II
188 Q. Did you receive a permit to put up a new fence? A. I didn't personally, no.

Q. You don't know whether there was a permit in effect, then, when that new fence was erected, do you? A. I was advised by my contractor that he had a permit, yes sir.

Q. Do you know when he obtained that permit? A. I do now, because I went down and got a copy of it, yes, sir.

Q. When did he obtain it? A. I don't know the exact date, it is written on the permit. My attorney, I believe, has a copy of it.

Q. Well, approximately when? A. It is my recollection that this question came up when there was -- I am not sure whether it was the argument on the temporary restraining order or on the preliminary injunction, and I think that question was raised at that time. If I had the exact date, something is contained in one of the affidavits supporting these pleadings.

Q. Isn't it a fact that that permit was obtained after the fence was put up and after you had been put on notice by the District that no permit had been obtained? A. Which question do you want me to answer first?

Q. Answer them all together, separately, or any way -- . A. They can't be answered together.

II 189 Q. Isn't it a fact that the permit was obtained after the fence had been put up? A. I subsequently learned this, yes.

Q. Isn't it a fact that the permit was obtained after you had been put on notice by the District that a permit was necessary? A. No, sir, I was not put on notice to this effect.

Q. Was your contractor put on notice? A. This I do not know.

Q. By the way, did you have a permit to do the remodeling of the building? A. This I do not know, I would assume my contractor did, by the nature of the remodeling.

* * * *

REDIRECT EXAMINATION

BY MR. WILKES:

Q. I show you what has been marked as Plaintiffs' Exhibit 30 for identification and I ask if this notice from the District of Columbia Department of Licenses and Inspections was served upon you?

II 190 A. Yes, sir.

MR. WILKES: I offer this in evidence as Exhibit No. 30, and I would also like to offer in evidence at this time the photographs which were marked for identification yesterday.

THE COURT: Very well, admitted.

(Plaintiffs' Exhibits Nos. 25 through 30 were received in evidence)

MR. WILKES: I should like to read into the record:

You are hereby ordered to repair dilapidated fence, front and rear yard, Section 2514 D. C. Housing Regulations. This Order may be complied with by the removal of fence.

Addressed to Mr. Edward G. Gruis.

Re: 411 Second Street, S.E.

Dated: April 25, 1961

BY MR. WILKES:

Q. At the time that order was directed to you, had you started to take down any part of the fence? A. No, sir, I had not.

Q. And all of the removal of that fence was done subsequent to the receipt of that order? A. That is right.

THE CLERK: Plaintiffs' No. 31 for identification.

(Color photo of old fence was marked Plaintiffs' Exhibit No. 31 for identification.)

MR. WAGMAN: No objection.

II BY MR. WILKES:

191 Q. I show you what has been marked as Plaintiffs' Exhibit No. 32 for identification and ask you if you took this photograph? A. Yes, sir, I did.

II Q. Now, you have testified on cross-examination that in connection with parties using the right of way, in connection with 192 premises 409-411 Second Street, that when they proceeded eastward on the public alley, they had to contact you to find out whether or not they could get through? A. Our service people?

Q. Yes. A. Yes.

MR. WILKES: I offer that as Exhibit No. 32.

THE COURT: Admitted.

THE CLERK: Plaintiffs' 32 into evidence.

(Plaintiffs' Exhibit No. 32 was received in evidence.)

THE COURT: Mr. Wilkes, in this No. 31, your question to

him was, you said, "This is the old fence in the background center, and is that the opening for ingress and egress."

MR. WILKES: Yes, Your Honor.

THE COURT: Now, which is the old fence?

THE WITNESS: It is the grey one.

MR. WILKES: Mr. Gruis, would you step up here, please?

THE COURT: Do you want to come, too, Mr. Wagman?

(Counsel and the witness approached the bench.)

THE COURT: Which did you say is the old fence?

THE WITNESS: This grey fence back up in here is right by the side of the --

THE COURT: This, you mean?

II
193 THE WITNESS: Yes, ma'am, and this is the gate that the people went in and out there. I believe perhaps there is another picture over there identifying it.

MR. WILKES: There is one.

MR. WAGMAN: Your Honor, these are the gates that were put up by the defendants and they are at the west end of the right of way.

THE COURT: These right here?

MR. WAGMAN: The front ones and the one in the rear marks the east line of the right of way and is between the property of the Ishes and that of the plaintiff Gruis.

MR. WILKES: Mr. Gruis, would you point out the location of the old fence on Plaintiffs' Exhibit No. 1?

THE WITNESS: The old fence was located right along here.

THE COURT: Just one moment. Let's let the reporter sit down, so that she can be comfortable.

(End of bench conference)

BY MR. WILKES:

Q. Would you point out on Plaintiffs' Exhibit No. 1 the location of the old fence, your removal of which and replacement by a new cedar spring fence is the subject of the counterclaim of the defendants Ishee against you? A. The old grey fence extended from along the green line of, I believe our exhibit is Plaintiffs' Exhibit 1, from the southwest corner of the Folger property to the northwest corner of the Folger property.

* * * *

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BY MR. WILKES:

Q. Mr. Gruis, I show you Plaintiffs' Exhibit No. 33 and I ask you whether or not you took that photograph? A. Yes, sir, I did.

Q. In the foreground -- where was it taken from, sir? A. Either the second or third floor of the apartment building in the back, straight down, diagonally down from the second or third floor of the apartment.

Q. Is this the old fence that has been referred to? A. Yes, sir.

Q. Is that the gate in the old fence that was referred to?

A. Yes, sir.

II
195 Q. I show you Plaintiffs' Exhibit No. 34 and ask you if you took that photograph, sir? A. Yes, sir, I did.

Q. Are they the barricades erected by the defendants in the foreground? A. Yes, sir.

Q. Directing your attention to some upright posts north of the area colored in yellow, what can you tell us about those, sir?

A. I believe the defendants, at the time I originally acquired the property for the apartment, had a fence extending along the north line of the right of way or in the approximate location of the north line of the right of way, and these posts were the posts that held that fence. I believe the fencing had come down, but some of the posts were still standing along that north line.

Q. Now, that fence which was north of the right of way and running generally east and west, you say that was removed? A. Yes, sir.

* * * *

II 196 Q. Now, there came a time when you constructed or had constructed a new fence at the rear of your property? A. Yes, sir, I did.

Q. Did you do that work or was that --? A. That was done by my contractor.

MR. WAGMAN: No objection.

MR. WILKES: I offer Exhibit No. 35.

* * * *

Q. I show you Plaintiffs' Exhibit 35 and ask you if any portion of your new fence appears in that photograph? A. Yes, sir. The northwest corner of my rear property line shows just part of the fence as well as the new fence coming down the north boundary of my property line.

Q. What is the fence that is just to the right of that photograph? A. I believe that is the fence separating the properties between -- the defendants' property and the property to the east of the defendants' property.

Q. Who resides there? A. Mrs. Prettyman.

Q. That fence which is an extended line, generally, with your

new fence is the fence that runs along this line that divides Ishee from Prettyman? A. Yes, sir.

* * * *

Q. Have you taken that photograph? A. Yes, sir, I have.

Q. Is it a fair representation of what it purports to show?

A. Yes, sir.

Q. Where is it taken from? A. It is taken from, I am not sure whether it was taken from the roof or taken from the third floor of the Folger apartment building, in the back, looking downward on the fences, both of the Prettyman's, separating her property from the defendants' property, and the fence, our new picket fence, separating the Folger property from the Ishee property, and also partway across the easement.

Q. Is that the new fence that you constructed, after you took down the old fence after having received an order from the District II 198 of Columbia to take down the old fence or repair it? A. Yes, sir.

Q. The cedar spring type of fence, that is the new fence that you constructed? A. Yes, sir.

Q. The fence to the right of that, that is the fence between Ishee and Prettyman, which is an extension of this line in this area? A. Yes, sir.

* * * *

I show you what has been marked as Plaintiffs' 37 for identification and ask you if you took that photograph? A. Yes, sir, I did.

Q. Where was it taken from? A. I believe this one was taken from the roof of the Folger Apartment, at the back of the building, looking downward on the right of way at the fence separating the II 199 Folger property from the Ishee property, also the plaintiff Horton's fence which was also improved at the same time the new fence was put in. I also believe it is part of Mrs. Schreiber's yard, too.

Q. Along that portion of the fence shown in the photograph, where it approaches the blue line at the rear of Horton -- A. That is right.

Q. -- it would appear that the fence swings in an eastwardly direction? A. This is correct.

Q. Was that done in that manner at your direction? A. Yes, sir, it was.

Q. For what purpose? A. To allow Mrs. Horton a little wider passage to get down to the right of way.

THE COURT: To allow Mrs. Horton what?

THE WITNESS: To allow her a little wider passage to get through to the right of way.

THE COURT: Mrs. Horton's property is numbered what?

THE WITNESS: That is Lot B or No. 176 North Carolina Avenue.

BY MR. WILKES:

II 200 Q. This triangle in the lower left-hand corner of this photograph, is that Mrs. Horton's? A. Yes, sir.

Q. Now, this string that you see along the cedar spring fence, what was that tied into at the two ends? A. After this proceeding came up, I got a survey by the District of Columbia. The Surveyor's office came out and surveyed the rear of my property and part of the north line of my property and set points or marks to indicate where my property line came. That stringer was run between the points or marks of the District Surveyor's office.

Q. Now, when you refer to those marks, are you referring to the tacks that are shown in Plaintiffs' Exhibit 38 for identification?

Q. Yes, sir. These tacks, one of the tacks was put in the northwest corner of the property line and the other tack was put generally in the area of the southwest corner of our property line; I say generally in the area.

Q. That is .96 or ninety-six hundredths of a foot east of your property line? A. Right, that would be about ten or eleven inches.

Q. And it is that tack which is to the east, the south end of the string by the Horton property? A. Yes, sir, it is.

MR. WILKES: I offer Exhibit 37 and 38 into evidence, if Your Honor please.

THE COURT: Admitted.

II 201 * * * *

Q. I show you what has been marked as Plaintiffs' Exhibit 39 for identification and ask you if you know what that is, sir? A. Yes, sir, that is a side view of the previous picture which was just shown to me of the fence running along the west line of the Folger apartment in the back, the stringer has been set in the surveyor's

tack at the northwest corner, brought down inside the fence and set at the surveyor's tack in the southeast corner. Now, Mrs. Horton has a gate between her property here and our property and the tack can't reasonably be set on that gate. For purposes of specifically identifying, I would assume that is why the surveyor said it was approximately ten inches to the east of where our property line comes.

Q. In other words, the surveyor put the south tack where you had set back ninety-six-one-hundredths of a foot within your property line at this location? A. Right.

Q. And the string was pulled between the two tacks? A. That is correct.

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Q. Now, the side of the fence, that is shown there, is on the Ishee side, is that correct? A. Yes, sir.

MR. WILKES: I offer Exhibit No. 39.

THE COURT: 39 is admitted.

THE CLERK: Plaintiffs' No. 39 into evidence.

(Plaintiffs' Exhibit No. 39 was received in evidence)

THE COURT: This green house on this No. 39, whose house is that?

THE WITNESS: I believe that is Prettyman's house, the property to the east of the defendants' home.

THE COURT: And on the left?

THE WITNESS: I believe that is part of the defendants' home.

THE CLERK: Plaintiffs' No. 40 for identification.

(Color photo of barricade, was marked Plaintiffs' Exhibit No. 40 for identification).

MR. WAGMAN: No objection.

BY MR. WILKES:

Q. I show you Plaintiffs' Exhibit 40 for identification. Did you take that photograph? A. Yes, sir, I did.

Q. The structure in the foreground is the barricade, that is, the western portion of the barricade constructed by defendants Ishee, is that correct, sir? A. Yes, sir.

Q. Through to the left, you see posts generally north of the yellow area, is that correct, sir? A. Yes, sir.

Q. And were the boards for the obstruction, erected in August of 1962, taken by the defendant Ishee from the fence that was located along the northerly side of the right of way? A. I don't know this

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203

for a fact, they appear to be the same boards because--

Q. Why do you say that? A. Well, they are the same color as the fence was that was there before and the cross pieces appear to be similar to the fence that was there before, along the north border of the easement.

* * * *

Q. Now, Mr. Gruis, you stated on cross-examination that there came a time, I believe you said December of 1962, when you received a letter from Mr. Ishee purporting to revoke a license? A. Yes, sir.

II 204 Q. Thereafter, did you continue to use the easement area, the right of way area? A. Yes, sir.

Q. Now, when you received that letter purporting to revoke a license, that was four months after these fences had been constructed across the right of way, isn't that correct? A. That is correct.

Q. That was during the period that this matter was actually in dispute? A. That is correct.

Q. Thereafter, during that period of dispute, the defendant Ishee erected chicken wire, and where was that? A. That was located exactly in front of my gate leading onto the Folger property, it was right across the front of the gate, through the stockade fencing.

Q. From one side of the gate to the other end substantially up against it, is that right? A. Yes, one of the earlier exhibits shows the gate open, so the chicken wire was put right across that gate leading out onto the easement.

Q. Thereafter, a temporary restraining order was procured from Judge Pine to preclude the defendants from interfering with the removal of all the barricades that were involved in this case, is that correct, sir? A. That is correct.

II 205 Q. Were you present when the barricades were taken down? A. I assisted in taking down the barricades.

Q. And what did the Ishees do, if anything, when the barricades were taken down? Did they do anything with them? A. You mean at the time that I was taking down the barricades?

Q. At the time or immediately after, or any time thereafter; what did they do with the barricades that were taken down in accordance with the temporary restraining order? A. Mr. Cornell, who I believe has testified in this proceeding, and I put down the barri-

cades and I believe we set them over -- I asked Mrs. Ishee where she would like us to put the barricades and she said she didn't care, so we stacked them neatly over in the corner by, I believe, their trash receptacles. We took out some of the posts, I asked her if that was satisfactory, we filled up some of the holes. She came back out and told me no, the court order says you have to take down every one of those posts. Well, one post really was at their convenience. I left one post down near Mrs. Schreiber's fence because it wasn't interfering with anything and it was right next to her fence and held one end of the fence, and so I left that post in. She informed me that the court's order said all those posts were to come down, so we took that post down also. I believe there was an exchange of words between Mrs. Ishee and either Mrs. --

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Q. Mr. Gruis, let me ask you the question again: What, if anything, did the Ishees do with these barricades, or what you may call them, after they were taken down pursuant to the temporary restraining order? A. After I took the barricades down, they were reconstructed or put back up along the north border of the easement or the right of way area.

Q. Along in this area? A. Right, along the north side.

Q. North of the yellow area, is that correct, sir? A. Yes, sir

Q. Generally in the location where the fence was before they constructed the barricade, is that right or wrong. A. That is correct, sir.

Q. So as of today, you have substantially the situation that existed prior to the time the Ishees took down the fence and put up the barricades, is that right or wrong, sir? A. That is correct, sir.

Q. Mr. Gruis, do you know precisely where the old fence was, that was along the rear of your property? A. Not precisely, no, sir. I, personally, didn't tear it down, it was removed by the contractor.

II
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Q. To the best of your knowledge, Mr. Gruis, is your new fence in any respect, or to any degree whatsoever, westward of where the old fence was? A. I was advised by the man who constructed the fence that the new fence was put up west -- or put up to the east of where the old fence stood; how much, he didn't say, he said it

was set back slightly from where the old fence was standing.

Q. When you say eastward, you mean closer to your building--
A. Closer to the Folger Apartment, yes, sir.

Q. -- than where the old fence was? A. That is correct.

THE COURT: Couldn't you judge of that by your observation?

THE WITNESS: Well, Your Honor, there is a concrete foundation in the back of the apartment building.

BY MR. WILKES:

Q. Now, when you say in the back, would you come down and point this out on Plaintiffs' Exhibit No. 1?

Q. This is a concrete foundation in here and some of it has been chipped away.

THE COURT: Well, do you mean that you made it concrete or --

THE WITNESS: No, it was concrete when I acquired it, Your Honor. In constructing the new fence, one of the workmen advised me that he chipped off a little bit of that concrete to set the fence back, so I would assume that if he chipped away part of the concrete, that perhaps in the past it extended out to where the old fence stood. Now, by I -- today I really do not know whether it is standing on exactly the same spot, but I have been advised it was moved back, moved towards the building somewhat.

BY MR. WILKES:

Q. When you say a concrete foundation, do you mean that the rear yard is paved? A. Yes, sir.

* * * *

Q. Directing your attention to Plaintiffs' Exhibit No. 35, there is a brick area, can you describe on Plaintiffs' 1 where that is, sir? A. Yes, sir. This brick yard in this Exhibit 36 is located in this yard here, ma'am, where the house adjoins the defendants' property.

Q. Directing your attention to Plaintiffs' Exhibit 33, do you see any portion of the paved area of your rear yard and so you see the old fence? A. Yes, sir.

Q. Would you step up and show Her Honor? A. All right, sir. (Approaching bench.) The grey fence in this exhibit is the

old fence of the apartment building and just to the east of that fence is a concrete foundation, somewhat worn away from foot traffic.

THE COURT: This is east?

THE WITNESS: Yes, ma'am.

THE COURT: Thank you.

(The witness returned to the stand).

BY MR. WILKES:

Q. Now, I direct your attention to Plaintiffs' Exhibit 37 and ask you if that is the new fence? A. Yes, sir.

Q. Do you see any portion of the paved area? A. Yes, sir.

Q. Would you step up and show Her Honor where the paved area is and where the new fence is? And keep your voice up, please.

(At the bench)

THE WITNESS: Your Honor, this is the new stockade fence at the west end of the Folger apartment and as the light is showing through this gate that is open, it reflects on the concrete foundation that is there.

(The witness returned to the stand).

BY MR. WILKES:

Q. Now, have you inspected that concrete to determine whether there is any indication of any spot, eastward of your new fence, where the posts of the old fence would have been? A. East of the new fence?

MR. WILKES: Will the reporter read back the question, please?

(The question was read by the reporter).

THE WITNESS: Yes, I have.

BY MR. WILKES:

Q. What have you observed? A. I observed that there is no discernable identification as to where the old fence was, insofar as where the posts of the old fence may have stood.

Q. You see, eastward of your new cedar spring fence, no evidence in the concrete of where an old fence would have been, which would indicate that your new fence is westward of the old fence, is that correct? A. My new fence is westward of the old fence?

Q. You have seen no evidence of any holes in the concrete, eastward of your new fence, which would indicate that the new fence had been pushed farther westward than the old fence, is that correct?

Q. Mr. Gruis, to the extent that you may have acquired title by adverse possession to property westward of your new fence, up to the point where your old fence was located, are you willing now to abandon that back to the point where your new fence is located? A. I am.

MR. WILKES: No further questions.

RECROSS EXAMINATION

BY MR. WAGMAN:

Q. Mr. Gruis, when did you receive notice from the District of Columbia to repair or remove the fencing around your property? A. I believe the date of that notice is in early 1961.

Q. April 1961, is it not? A. I believe so, yes, sir.

Q. And it wasn't until March of 1962 that the gate disappeared? A. That is correct.

MR. WILKES: I beg your pardon, what was the question?

BY MR. WAGMAN:

Q. It wasn't until March of 1962 that the gate at the rear II 212 fence came off, was it not? A. I believe I testified to that, yes.

Q. And the fence itself was not taken down until sometime beginning in December of 1962? A. That is correct.

Q. Directing your attention to the fence that you said had been running east and west somewhere north of the right of way on the defendants' property prior to the time the gates were set up, where did you testify that that fence was located? A. I said to the north, running parallel to the north of the easement.

Q. Did it run fully across the lot or only partially? A. I think it only ran a half or maybe three-fifths of the way across the lot.

Q. Did you ever measure whether that fence stood entirely on the lot of the defendants, some distance from the easement, or whether it stood on the north line of the easement? A. I'd have no occasion to do that, sir.

Q. Then you do not know whether the fence that is now along the north line of the easement stands in exactly the same spot as the previous fence? A. I didn't say it stood in exactly the same spot.

Q. Have you had occasion to look at this particular fence that

II 213 is now standing on the north line of the easement, in recent, in recent weeks? A. Yes, sir.

Q. Did you see it when it was first erected? A. No, sir, I wasn't there the day it was erected.

Q. Did you see it shortly after it was erected? A. I believe so.

Q. Do you know the condition of that fence now? A. I think it is pretty shabby, sir.

Q. Have you noticed any broken boards in it? A. Yes, sir, I believe so.

Q. Do you know how they came about? A. I have seen the children of the defendants crawling on the fence.

Q. And you don't know whether or not those boards were broken by a car backing into it, coming out of the garage, backing into it?

A. I did not observe that, no, sir.

Q. Do you know why or for what reason the chicken wire was put up behind the gate leading to the rear of your premises? A. No, sir, I do not.

Q. You never heard any reason as to why it was done? A. I don't know what you mean by that. Since this proceeding has come up now, I have heard it had been put up there to interfere with my use, but at the time it was put up, I was summoned by my custodian to come over and look at this, to see what could be done about it and it was at that time we called our lawyer.

II 214 Q. When the gates were taken down, what did you have to do to remove the gates?

THE COURT: You are talking now about the gate?

MR. WAGMAN: The gate taken down as a result of the injunction, Your Honor.

THE WITNESS: Mr. Cornell and I, I believe I got some two-by-fours to wedge or use them as a lever to wedge the posts out of the ground.

BY MR. WAGMAN:

Q. How did you remove the gates? A. One or two of the gates, we were -- Mr. Cornell and I were able to slide off by ourselves with some ease. There were a couple of them we had to work at, in order to get them off of their hinges.

Q. It was a matter of lifting the pins out of their hinges, was it not? A. Well, not quite, because the gates apparently had sprung on the hinges and we had some difficulty in getting those gates off.

Q. When the gates and the posts were taken down, plaintiff Schreiber came out, did she not? A. Yes, sir.

II 215 Q. And did she make a statement to you at that time or did you hear her make a statement? A. She was talking to me, yes, sir.

Q. And what did she say? A. Well, frankly, I don't know whether she had heard what took place in court that morning and she was asking me: What's this all about?

Q. Did she make any statement to the effect that she could now reclaim her land? A. That I don't recall. There was an exchange of words between Mrs. Ishee and Mrs. Schreiber and I didn't know -- I was taking fences and gates down.

Q. On cross-examination, I believe you testified at first that the gate, which had been taken off the fence at the rear of your property and bordering on the Ishee property, had disappeared sometime in about March or April of 1962, is that correct? A. No, sir, I didn't say that.

Q. What did you say? A. I said that the gate came off, I believe you asked me how it came off and I told you I didn't know.

Q. And do you know whether it had ever come off before? A. I really don't know. I have no recollection.

Q. Did you know where the gate was? A. On the photograph, you see it is standing right next to the fence.

II 216 Q. Behind the fence on the rear of your property, is that right? A. Yes, sir.

* * * *

ROBERT W. ACKER

II 217 called as a witness by the plaintiffs, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WILKES:

Q. State your full name, please, sir. A. Robert W. Acker.

Q. Where do you reside? A. In 1931 North Cleveland Street,

Arlington, Virginia.

Q. Where are you employed? A. Realty Title Insurance Company.

Q. In what capacity? A. Assistant Vice President and title officer.

Q. I will show you what has been marked as Plaintiffs' Exhibit 42 for identification and ask you if that is your signature that appears there as Assistant Vice President under the title of Realty Title Insurance Company, Inc.? A. Yes, it is.

Q. Did you make this report, sir? A. Yes, I did.

II 218 Q. In making this report, did you make it from records that are kept in the regular course of business of a title company? A. That is correct.

Q. Is this report, to the best of your knowledge, information and belief, correct? A. Yes, it is.

MR. WILKES; I offer it in evidence and I have no further questions, Your Honor.

CROSS-EXAMINATION

BY MR. WAGMAN:

Q. Mr. Acker, did you search the title, yourself? A. Yes, I did.

Q. You went through the entire file, is that correct? A. During this time period.

Q. How far back is that? A. This is between January 1, 1924 and December 31, 1941.

Q. You didn't go back beyond 1924, then, did you? A. No, I did not.

Q. Do you know how this Lot 849 was created? A. It was a split of former Lot 845. Why it was split, I don't know, but it was.

Q. When was the split? A. This I can't say, either, because there is no actual evidence on the records showing when it was split.

II 219 Q. Did you search the taxes on this piece? A. No, I did not.

Q. Then you have no knowledge whatsoever whether taxes were paid or unpaid, is that correct? A. I know the taxes were not paid at a certain period of time because there was a tax deed put on there.

Q. When was that? A. As it shows in the report here, a tax deed recorded in January of 1931.

Q. Were there any other deeds following that? A. What type of deeds?

Q. Any other tax deeds. A. No tax deeds.

Q. Following January 1931, is that correct? A. Not until up through December 31, 1941.

Q. December 1941? A. Right.

Q. Was there another tax deed placed on the property at that time? A. Not through December 31, 1941. There is only one tax deed that appeared during this time period.

Q. Was there another tax deed later? A. I don't know that.

Q. According to what you found, in whose name was the lot recorded during all those years? A. The record title was in one Lee Walsky.

II 220 Q. Lee Walsky? A. Lee Walsky.

Q. Is that 848 or-- ? A. He acquired title to 845, which subsequently became 848 and 849.

Q. When did he acquire title to Lot 845? A. Prior to January 1, 1924.

Q. Did you search Lot 845? A. Up to the time that there was actually any evidence of a split, yes.

Q. You didn't go beyond January 1, 1924, even as far as Lot 845 is concerned, is that correct? A. No, I didn't personally make a search prior to that time.

Q. Do you know whether anyone did in your organization? A. Yes, there are records.

Q. You don't know what those records show, though, do you? A. They show that title was in Lee Walsky as of January 1, 1924.

Q. When you searched Lot 849, did you notice -- in your search, did you find any recordation of an easement against Lot 849? A. Yes, there is an easement.

II 221 Q. Against Lot 849? A. Yes.

Q. Where is that? A. I don't know the specific reference to the deed itself, but there is a right of way, a twelve-foot right of way.

Q. On 849? A. On 849.

Q. Is that on the deed? A. It is on deeds prior to 1924, covering 845.

Q. Do you know whether it was on Lot 849 when it was created? A. If it was on 845, it would have to be on 849.

Q. Do you know whether the taxes that were assessed against Lot 848, based upon its valuation -- against Lot 849, strike that, Lot 849, took into account the easement? A. Well, I had no way of knowing.

Q. If there were no easement recorded on Lot 849, against Lot 849, would that be reflected in the taxation assessment? A. I wouldn't know that.

Q. Did Lee Walsky ever have title to Lot 849? A. He acquired title to 845.

Q. That's not what I asked you. Did he ever have title to Lot 849? A. When he acquired title to 845, he took that which encompassed both lots, he had to have title to 849.

Q. Then you don't know why it was created? A. I have no idea why.

Q. You don't know the manner in which it was created? A. I do not.

Q. And you are only assuming that since he owned all of Lot 845, that therefore he would have title to Lot 849? A. If he acquired 845, which encompassed both lots, he had to acquire title.

Q. Is there any record that he ever had title, as a matter of record, to Lot 849? A. Insofar as he acquired 845, yes.

THE COURT: Aren't you saying that 848 and 849 were carved out of 845?

THE WITNESS: Out of 845, that is correct.

BY MR. WAGMAN:

Q. According to the record you have there, of your search, Lee Walsky does not appear upon that, does he? A. Yes, he does.

Q. He appears on this record? A. Yes, he does.

Q. As what? A. Title, according to the record, is vested in Lee Walsky during said period of time.

Q. According to your search, Lee Walsky was the owner of that until 1941, is that right? A. He had the record title to it.

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TOMMY C. ISHEE

II
224 a defendant, called as a witness on behalf of the defendants, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WAGMAN:

Q. Please state your full name and address. A. Tommy Cobell Ishee, 149 D Street, S.E., Washington, D.C.

Q. And you are one of the defendants in this action? A. I am.

Q. And your wife, Maryclaire Ishee, is the other defendant?

A. Yes.

Q. And you are the owner, jointly with your wife, of the property 149 D Street, S.E.? A. Yes.

Q. And when did you purchase the property? A. I believe in -- I am not sure of the year, I think in 1950 or 1951.

Q. Did you reside in it when you purchased it? A. No.

II
225 Q. Where were you then living? A. I believe when we first purchased the property, we were living in Park Fairfax, an apartment development in Virginia.

Q. And what was the property used as, when you purchased it? A. It was a tenement.

Q. How many units were in it? A. Four.

Q. And what was the condition of the rear of the property when you purchased it? A. I don't know what you mean, the condition of the rear of the property.

Q. Was there an alley to the rear of the property when you saw it? A. Not an alley to the rear of the property, no.

Q. What was there? A. There was a twelve-foot right of way which was included in my deed to the property.

Q. You knew of the existence of the alleged right of way at the time you purchased the property, is that correct? A. I did.

Q. Did you know to whom or for whose benefit this right of way existed? A. As stated in the deed, I knew this.

II
226 Q. What fencing, if any, was there on the property when you purchased it? A. There was a partial fence across and between 147 and 149, there was a fence between 149 and 151, these fences being near the front of 149 D Street. There was a fence that ran north

and south from the rear of 147 to the alley. And I think there was a fence between -- well, running north, and south from the rear of 151 to my property line, to my south property line.

Q. Was there a fence that ran east and west to the rear of the building on the said lot? A. I am not sure in my recollection of this, there might have been a partial fence, there was never, to my recollection, a fence that ran across the entire lot.

Q. And where was this partial fence, if you recall? A. It would be generally to the north of the yellow area on the chart.

Q. Do you know how far north it was? A. I don't know.

Q. You don't know whether it was on a line with the easement or not, do you? A. No.

Q. How far did that fence run towards the east? A. Well, it began at the fence line that runs between Lot 46 and Lot 848 and ran part of the direction, as I remember and I am not too clear in my memory of this fence, as I say we didn't live there, but I think that this ran -- it ran part of the distance west toward the line between 149 and 147.

Q. Was Lot 849 separate and apart from Lot 848 at that particular time? A. By fence?

Q. Yes. A. No.

Q. Did your fencing enclose Lot 849? A. Yes. I might say that the iron fencing in the front of the house also enclosed it.

Q. Lot 849. Did there come a time when you moved into the house? A. Yes.

Q. When was that, to the best of your recollection? A. Well, I know that it was the beginning of Eisenhower's second term, so that figures to be about seven years ago, which would be about 1955 or 1957.

Q. Prior to that time, did you have occasion to visit the property? A. Yes, quite often.

Q. Did you have occasion to visit the rear of the property? A. On occasion, yes.

Q. Did you have occasion to see the use that was being made of the right of way? A. Yes.

Q. Will you tell us what that use was? A. It was used by the neighbors for removal of trash and garbage, the bringing in of oil,

and at many times, well, not -- now this you are asking me now is before I moved into the property, is that correct? Well, this was general use which was being made of it.

Q. At the time you purchased 849 -- 848, where were the services of 848 handled from? A. From the rear.

Q. From the rear. What type of heating plant did the building in 848 have in it at that time? A. Oil.

Q. And was the oil brought in from the rear? A. It was.

Q. Were there any other buildings adjoining the right of way which were serviced by oil trucks at that time, to your knowledge? A. Yes, the Folger apartments were and I believe that is the only one that I ever -- I don't believe the others had the oil delivery in the rear, only the Folger apartment.

Q. Did there come a time when you removed the fence to the rear of the property? A. Yes.

II
229 Q. When was that? A. That was after we had moved into the place.

Q. And did you build any fencing on the property? A. I also built a fence a part of the way across the lot to the north of the yellow marking on this chart.

Q. And in which direction did that fence run? A. It ran generally in an east-west direction but actually -- no, I guess, no, it ran -- it would have run -- it ran from southwest, well, let's say from northeast to southwest. It was not built, either, across the entire lot.

Q. And did you obtain a permit to erect that fence? A. I did.

Q. Do you know how high that fence was? A. Seven feet.

Q. And of what material was it constructed? A. Wood plank-

THE CLERK: Defendants' No. 18 for identification.

(Building permit receipt for erection of fence was marked Defendants' Exhibit No. 18 for identification.)

BY MR. WAGMAN:

Q. Will you identify this paper, please? A. Yes, this is the permit for erecting that fence.

Q. That is the receipt for the permit? A. Yes.

MR. WAGMAN: I tender this into evidence, Your Honor.

THE COURT: Very well.

* * * *

II
230

BY MR. WAGMAN:

Q. Where was that fence located upon your lot? A. To the north of the yellow marking on the chart.

Q. Do you know how many feet north? A. Well, it varied, it was closer to, almost on the yellow line in its lower portion, which would be the southwest portion, it was closer to the line and then I had a break of approximately eighteen feet or more, eighteen to twenty feet, and then the remainder of the fence, which was more of a screening than a fence, veered away from the yellow line on the chart; in other words, it ran more to the northeast of the yellow line as it went toward the northeast.

Q. But the fence stood entirely upon your land, did it not? A. Yes, and I was about to add that at its farthest extremity up on the side next to the apartment house, the fence was approximately ten feet away from the yellow line here.

Q. For what purpose was that fence constructed? A. As a screen and also as a help in keeping the children in, and so forth.

* * * *

II
231

BY MR. WAGMAN:

Q. How many children do you have? A. Ten.

Q. And how long did this fence stay up? A. Well, it stayed up from 1957 until the gates were put up at the -- on the rear of the property.

Q. Now, for what reason, if any, did you put up those gates in August of 1962? A. The reason for putting up the gates was to deny to the general public the use of this area. There was continual breakage of glass, and men at night drinking wine, so there was a general state of noise and uncleanliness, and the use of it by persons not entitled to use it and not permitted to use. Another reason was that, particularly following the acquiring of the apartment house by the syndicate which Mr. Gruis heads, the caliber of the tenants in that apartment house went down and they parked habitually on the right of way and on occasion threatened my wife--

II
232

MR. WILKES: Objection, if Your Honor please. The act of any

person, in the first place, if this is intended to be chargeable against Mr. Gruis, I would first object unless it is first established who did it, when he did it, that he was in fact a tenant of premises owned by Mr. Gruis. And I further object on the basis that this would have utterly no bearing on whether or not a right of way was established for the benefit of the Folger apartments by adverse possession.

THE COURT: Mr. Wagman, the question that you asked him was, for what reason did he put up the gates? Now, he might have a lot of reasons, but it seems to me that the only reason we are concerned with in this case is some reason that relates particularly to some one or all of these plaintiffs and unless he does, I don't think it is germane or relevant here.

MR. WAGMAN: I will be more specific in my questions, if the Court please.

BY MR. WAGMAN:

Q. Did you know the plaintiff Gruis prior to 1960? A. By sight only.

Q. And when did you meet and get to know the plaintiff, Mr. Gruis? A. I don't believe I ever met him until I went to his home to discuss this matter of buying the Folger apartments.

II 233 Q. When was that, if you recall? A. I think around 1960.

Q. Did you receive an invitation from the plaintiff, Mr. Gruis, to come to his home? A. Yes.

Q. And it was in relation to the purchase of the apartment house, the Folger apartments? A. Yes, sir.

* * * *

Q. You received a letter from Mr. Gruis inviting you to join in the syndicate, did you not? A. Yes.

Q. And you then attended a meeting at his house, did you not? A. That is correct.

Q. What was the result of that meeting, so far as you were concerned? A. I said that I wanted to think it over and I thought it over and I wasn't interested.

II 234 Q. And how did you advise Mr. Gruis that you were not interested? A. I advised him by letter.

Q. Is this a copy of the letter you sent to him? A. That is correct.

Q. Is there any reference made in that letter to the alley or the right of way to the rear of the property of the Folger apartments? A. There is.

Q. And what did you advise Mr. Gruis in that letter at that time? A. I advised him that the Folger apartment does not have access to the alley in the rear, the public alley ends on the west side of my property, and current use of the back of my lot for trash removal from the Folger apartment is a permissive use. I wished him luck in his venture.

Q. Did you receive any further communication from Mr. Gruis in answer to this letter? A. I did not.

Q. Did there come a time when you had further conversations or further communications with Mr. Gruis? A. I don't believe that since that time I have talked to Mr. Gruis.

Q. Did there come a time when Mr. Gruis and his associates purchased the apartment house? A. Yes.

II 235 Q. And that was following this letter that you sent to him, is that correct? A. Yes.

* * * *

BY MR. WAGMAN:

Q. At the time that Mr. Gruis purchased the apartment house, you continued to permit the services to come to the rear, did you not?

MR. WILKES: Objection, if Your Honor please. I object to the question on the basis that there is no testimony or any foundation that there was permission.

THE COURT: The objection is sustained to the form of the question, Mr. Wagman.

BY MR. WAGMAN:

Q. When Mr. Gruis purchased the property and took title to it, how did the services to the apartment house come in? A. In the same manner that they had before.

Q. Did there come a time when you served notice upon Mr. Gruis revoking the permission to use the rear exit-entrance through the alleyway? A. After I had installed the gates, which allowed the use to continue, there was a suit brought by Mr. Gruis and others, and I felt at this point that I had to establish my rights

in this matter, so at that point I sent a letter to Mr. Gruis telling him that the permission was withdrawn. I had no further occasion, myself personally -- my wife had occasion to come in contact with persons using this area, I think -- but I had no further occasion that comes to my mind immediately until the fencing was put across his gate, which was, as I say, after the permission had been revoked and I felt that I had to establish what was the case here, so I, on advice of counsel, if I remember correctly, I put this fencing across there to prevent his further use of that area.

* * * *

III
239

Q. Mr. Ishee, did there come a time in 1962 when you sent to the plaintiff Gruis a letter revoking permission to use the right of way?

MR. WILKES: I object to the form of the question, if Your Honor please. If he sent a letter, he has it in his hand, I have no objection.

BY MR. WAGMAN:

Q. Will you identify this letter, please? A. This is the letter I sent to Mr. Gruis rescinding his permission to use the property.

Q. Would you identify this? A. This is, we had asked for a return receipt and this is the notification that he would not sign the duplicate.

Q. What is the date of the letter? A. The date of the letter is December 1, 1962.

* * * *

III
240

Q. Between the period December 1960 and August 1962, did you have occasion to observe the use of the right of way by any of the tenants of the Folger apartment? A. This is between what dates?

A. Between December of 1960 and August of 1962? A. Yes, I did.

Q. Will you describe the use, if any, made of the right of way by those tenants? A. The tenants used it for ingress and egress, they used it for parking, that is all that occurs to me now. They used it generally as ingress and egress and they parked their

cars.

Q. Where did they park their cars? A. On the yellow strip indicated on the chart.

Q. Between 1951 and August of 1962, did you have occasion to observe the use of the right of way made by the plaintiff, Mrs. Horton? A. Mrs. Horton used the right of way for trash and garbage removal, they placed their trash cans and garbage cans on the right of way. She used it to put out building rubble, several tons of concrete rubble, onto the right of way which was left for a period of months and which I finally had hauled away. She used it to burn wood materials that were removed from her property onto this property and used it to burn an open fire. She used it for, well, I don't know, yes, on occasions I have seen her use it for ingress and egress. I might say that generally the trash materials she didn't want on hers, she apparently put it on this strip.

* * * *

III
241 Q. Between December of 1960 and August of 1962, did you have occasion to observe the use of the right of way made by the plaintiff, Mrs. Schreiber? A. Mrs. Schreiber on occasions set her trash cans on the right of way. She stored some, I suppose, firewood on the right of way and she stored or deposited an extremely large stump, it stayed there for several months or almost a year and which I finally had taken off the property myself, I had this removed.

I don't know who, but there was during this same period of time a refrigerator deposited, where it came from, I don't know. But it stayed on the lot for quite some time and this I finally had removed. I don't attribute this particular piece of equipment--

MR. WILKES: Objection, Your Honor please, I would move that this be stricken unless it can be connected up with some party to this suit or someone acting in privity with them, depositing a refrigerator within the right of way area in question.

THE WITNESS: Well, this was part of the thing that made it necessary for me to put the gates up, I had to be able to control the property in some way or other because I was subject to fine and imprisonment for the leaving of this material on the pro-

perty, and to keep it from being deposited there and continually deposited there--

THE COURT: Don't you usually get a notice to remove things and then if you don't move it, the District does, isn't that the way it is done?

THE WITNESS: We were instructed, Your Honor, by the District to clean this particular right of way up on more than one occasion and it was my understanding of the law, whether correctly or incorrectly, that if a refrigerator is found, is left open on your property, you are subject to a \$300 fine and imprisonment for a length of time, I don't know which.

THE COURT: As I said yesterday, it seems to me that the things he complains of ought to be tied in, Mr. Wagman.

MR. WAGMAN: Your Honor, I am trying to limit this to the question specifically of each of the plaintiffs and their tenants or visitors.

BY MR. WAGMAN:

Q. I show you this photograph which is marked Defendants' Exhibit for identification No. 6.

THE COURT: May I see 9 and 10 please.

THE WITNESS: This is the same general area as Exhibits 9 and 10.

BY MR. WAGMAN:

Q. What about Exhibit No. 7 for identification? A. This is III 244 in the same general area but a little to the west of it.

Q. No. 5 for identification. Now, directing your attention to No. 6 -- did you take these photographs? A. Yes, I think so, as I say, my wife or myself.

Q. What does No. 6 show? A. No. 6 shows the southeast corner of my property. It shows three trash cans overladen with the tops not secured, it shows a pile of wood and rubble.

Q. To whom did the wood belong? A. Mrs. Schreiber.

Q. Where was it? A. It was on the south boundary of my property.

Q. Was it on the right of way? A. Yes.

Q. How long was it stored on the right of way? A. I would say almost a year, I don't remember exactly.

Q. And directing your attention to No. 5, what does that photograph depict? A. That is my son sitting on the stump which Mrs. Schreiber had deposited on the right of way and which I had moved off the right of way.

MR. WAGMAN: I would like to offer these in evidence.

* * * *

III 245 Q. During that period of time, did you notice whether the right of way was used by any visitors or workmen for Mrs. Schreiber? A. Well, one visitor had the stump out on the right of way and had a chain saw and cut some wood off of the stump and cut this wood up and split it up into pieces.

THE COURT: Where did the pieces go then?

THE WITNESS: I am not sure whether or not they were taken in or whether that's the pieces that lie next to the fence there, Your Honor.

BY MR. WAGMAN:

Q. To your knowledge, have the plaintiffs, the Misses Connor, lived in the houses they own, 170 and 172? A. Not to my knowledge.

Q. In recent years, do you know who has been living in those houses? A. There have been in those two houses some different tenants, I presume, of these two ladies. One is a family who has two or three sons and I believe a daughter, and a son has at times played with my children, I believe the name is Cuthrell. I believe that is in 170.

III 246 Now, in 172, I am not sure, there seems at this time to be an array of different people living in this house and I don't know them personally. I believe there's at least two automobiles among the group who seem to occupy the house.

Q. Between the time you moved into the house in 1957, your property, and August of 1962, did you have occasion to observe the garages at the rear of the premises 170 and 172? A. The garage on 170 -- the garage at 172, I don't believe up to that time was ever used for anything other than storage of automobiles. The garage at 170 did have at one time an old automobile stored in it which these boys worked on, and on two occasions I remember I allowed him to back out into my yard so that he could turn around and get out and down the alley, out of his garage. That is the

only use I saw made of these garages.

Q. During the period August of 1962 to April or May or 1963, were any cars parked in that garage? A. Not in 170. I will correct myself, too, there was in 172, prior to this time, there was for a short time a use made of the garage at 172 by a gentleman who apparently was living there and had a small sports car and I was aware of this because in getting out of the thing, even with a sports car, he backed over into my car and broke a light on it.

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Q. How long a time did he use the garage for parking? A. Very short, because even then he found it very difficult to get in and out. At that time, both of the doors, which are sliding doors and they slide one over the other, they don't go around, they slide one over the other, so you can open only half of the garage at one time when both of the doors are handled.

Now, since this action was started and after the injunction was issued, there has been use made of that garage at 172 almost continuously and at times there have been one car parked in the garage, which is all it will take, and another car parked on the right of way and these cars at times intermittently or interchangeably use the garage. But when both of them are there, apparently they park one on the right of way and one in the garage.

Q. Have any alterations been made in that garage since April of 1962? A. Yes, following the injunction, I observed that persons, who I presumed to be the tenants and who have parked there since, came and attempted to-- after Mr. Gruis had removed the gates -- they came and attempted to put their car into the garage by opening the garage as far as it would open. This they were unable to do, so they got crowbars and they took both the doors of the garage and by doing this and cutting across the adjacent lots, they could swing the car into the garage.

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Q. Does that condition continue to the present time? A. Yes, it does.

Q. Now, what other uses have you observed the tenants of 170 and 172 make of the right of way? A. At this time?

Q. Between December of 1960 and August of 1962? A. Well, I don't believe that they make any, except they do set their trash out on the apron off the garages, which is not on my property, which

is open, they set their trash cans out there and these are usually not covered and the trash usually gets dispersed over the right of way area. Other than that, I don't think --

Q. I show you three photographs marked Defendants' Exhibits 2, 4 and 8 for identification. Did you take those photographs? A. Yes.

Q. What does No. 2 show? A. No 2 shows the rear of this garage and Mrs. Schreiber's gate.

THE COURT: You say the rear of this garage?

THE WITNESS: That's the garage at 172 from which both the doors were removed. This shows the doors off, it shows the trash cans uncovered and some litter around, some on the right of way and some not. These trash cans are not sitting on my property.

BY MR. WAGMAN:

III 249 Q. Now, No. 8, what does that show? A. That shows the same general area at a different time, with trash out in bags, boxes, unopened cans that are loose, et cetera.

Q. No. 6, what does that show? A. This is the southeast corner, back of Mrs. Schreiber's property, and if I remember this correctly, I am not sure but I think that's an old couch or a piece of an old couch by that pile of wood. It also shows boxes of trash and uncovered cans of trash and the rear of the apartment house being unfenced.

Q. Are all these cans of trash, sofa, and the rest on the right of way? A. Yes, they are.

MR. WAGMAN: I would like to offer these in evidence.

THE COURT: Admitted.

THE CLERK: Defendants' 2, 4 and 8 into evidence.

(Defendants' Exhibits Nos. 2, 4, and 8 were received in evidence).

BY MR. WAGMAN:

Q. Now, since April of 1963, has there been a fence running east and west on the north line of the right of way? A. This is following the injunction?

Q. Yes. A. After these gates were taken down, we had them replaced so as to be able to close in the end of the property north of the right of way. We had these gates reerected on a line running east-west, generally just off -- to the north of the yellow area on

III the chart.

250 Q. What was the condition of that fencing when you put it up in April of 1963? A. It was good, the original fence, unlike this scrap here, the fence that stood to the north of the right of way and to a point eight to ten feet away from it, was not an old dilapidated fence, it was constructed in 1957 out of oak planking which is good, solid material and will last. And in general, there was a mixture of new one-by-six boards and the older one-by-six boards that were used to construct these gates, and they were in good condition at the time they were put up.

Q. What is the present condition of that fence? A. There were, I believe--

MR. WILKES: If Your Honor please, I will object unless it is established, with respect to any change, that any party to this suit or anyone acting on behalf of them was responsible for any change.

MR. WAGMAN: Well, that is what I would like to bring out.

THE COURT: Very well.

THE WITNESS: There, I believe, were six gates that stretched this distance, two of those are completely broken apart and down --

III 251 MR. WILKES: If Your Honor please, this was precisely what my objection was. He is proceeding, notwithstanding the objection. I feel that it would be inadmissible with respect to any breaking of his fence unless it were tied down to someone whom I represent in this case or someone acting on their behalf within the scope of their authority.

THE COURT: I understand Mr. Wagman to say that he expected to do that.

MR. WILKES: I understand that, also, Your Honor please, but the witness was proceeding beyond the scope of Mr. Wagman's question and getting precisely into that question.

THE COURT: What was the last question, please?

(The question was read by the reporter as follows:

"What is the present condition of that fence?"

THE COURT: He said before that there were two gates broken apart, I believe. Well, anyway, you will have to connect it

in some way.

MR. WAGMAN: I will connect it, Your Honor.

BY MR. WAGMAN:

Q. Were these gates broken by the acts or actions of any of the plaintiffs or any of their tenants or agents? A. Yes, they were.

Q. By whom were they broken, if you know? A. They were broken by the person who uses the garage at 172 North Carolina Avenue; broke these two gates and also two of the others, actually four of them are broken out, but two are broken completely apart.

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Q. And how did he break them? A. He backed his car into them and I observed him backing his car into these gates and breaking them.

* * * *

THE WITNESS: In backing out of the garage, it is a very tight turn, even with both the doors off the garage, it is still a very tight turn and so in backing out, he backed into the gates on several occasions and finally they are broken completely apart.

THE COURT: Mr. Marshal, it seems quite warm in here. I wonder if you could open that door a little.

BY MR. WAGMAN:

Q. I show you defendants' Exhibits marked 21, 22, 23 and 24 for identification. Did you take those photographs? A. Yes.

MR. WILKES: No objection, Your Honor please.

BY MR. WAGMAN: What do they show? A. They show the condition of the gates about -- no, this was dated in November, actually since then they have been broken completely down and completely apart.

THE COURT: You said November, but you didn't specify the year.

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THE WITNESS: 1963.

BY MR. WAGMAN:

Q. They show the gates after they have been struck sometimes by the car of the tenants of the plaintiffs Connor? A. That is correct, but I wanted to point out that although they are broken here, they are now broken completely apart.

* * * *

Q. Prior to August of 1962, did you ever have occasion to repair or have repaired the fence and the gates therein that stood between your property and that of the plaintiff Gruis Lot 46? A. Over the years, I have made minor repairs on this fence.

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Q. Have you ever had occasion to repair the gate in this fence? A. In two instances. I don't remember the exact date, but within the past two years and after Mr. Gruis owned that property, the gate either -- it came off, it was taken off or knocked off -- it was off, at any rate, and I put it back on and then at a subsequent time, I am going back into my memory on this thing, and at a subsequent time I had a man rehang that gate.

Q. Was this fence on your land? A. Yes.

Q. Did there come a time when the gate came off completely? A. Twice.

Q. Did there come a time when the gate was not put back on?

A. It might have been, after I had put up the second time, that it came off again just before Mr. Gruis tore the fence down. I believe it did. I believe it was off again.

Q. Did there come a time when the fence was removed? A. Yes, sir.

Q. Do you know by whom it was removed? A. By the carpenters who are working on the premises at the Folger apartments.

Q. Was your consent or permission obtained before the fence was removed? A. No.

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Q. Did you receive notice that the fence was going to be removed? A. No.

THE COURT: Did you ever have a survey made to show where this fence was located, whether on your ground or on the ground of Mr. Gruis?

THE WITNESS: Yes, Your Honor, and of course it was -- I did have a survey made, but it was obvious to anybody looking at the plat, that the line, the property line is straight along Mrs. Prettyman's house which is 151 D Street.

THE COURT: That is on the side of your house?

THE WITNESS: That is on the side, so the line runs straight back. This fence jutted out. Mrs. Prettyman's fence is in line with her house. This fence jutted out at least a foot.

THE COURT: By this fence, you are talking about Mr. Gruis' fence, is that right?

THE WITNESS: I am talking about my fence that was between Mr. Gruis' property and mine.

THE COURT: You claim it was your fence?

THE WITNESS: Yes.

THE COURT: Whose ground do you say it was on?

THE WITNESS: It was approximately a foot inside my line, and the survey proved this out.

THE COURT: Do you have that survey?

III 256 THE WITNESS: I had a survey made and Mr. Gruis had a survey made and I was out there talking to the engineers when they were making his survey and the spots that they put, even after he had moved the new fence that he put up back about eight -- well, about a foot, that fence still stands on my ground. And the survey, the point where the string is, is in the middle of the stringer that runs along the fence. In other words, the fence that he rebuilt stands approximately halfway, splits the property line.

* * * *

BY MR. WAGMAN:

III 257 Q. Was another fence subsequently erected on that or adjacent to that -- along the property line? A. This is the fence I was just referring to that was erected by the carpenter and at the time that he started to erect this fence, he apparently was going to put it back but I told my wife that she might go out and tell him that if he was going to construct a new fence, he might want to put it back on his own property. He did move it back approximately a foot, but he still didn't get it on his property.

Q. Were you consulted, prior to the erection of this fence, by the plaintiff Gruis? A. No, I was not.

Q. Were you notified the fence was going to be put up? A. No, I became aware of it only on observing the carpenter about to go to work.

Q. Well, how long a period of time was the fence down completely, if you can recall? A. My estimate would be over six months. Frankly I don't remember how long, I know it was a tremendous burden to have the rear of my yard opened up to the rear of the apartment house, because of the children.

Q. If the fence that you had put up in 1957, the seven-foot fence, which ran east and west and connected with the fence running on the east line of your property between that of yours and Mr. Gruis, if that 1957 fence had still been standing at the time that Mr. Gruis removed that fence, would your yard have been enclosed at all? A. After he removed the fence?

Q. Yes. A. No, it would not have.

THE COURT: What is this you are saying?

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THE WITNESS: About what, Your Honor?

THE COURT: The answer you just gave.

THE WITNESS: Well, apparently, if I understood the question correctly, he said that if the fence that I erected in 1957 which ran east and west, were still there, even had that fence--

THE COURT: We are talking now about the fence that was on the northern portion of the yellow strip?

THE WITNESS: That is right.

THE COURT: Go ahead.

THE WITNESS: So his question was if that fence had still been standing, would the taking down of the fence between my lot and Lot 46 open up my lot to the rear of the apartment house, he said would my yard still have been enclosed after Mr. Gruis had this fence taken down. And my reply was that my yard would not have been enclosed, because this fence ran at an angle, in other words, if this is the east-west fence, his fence ran across it, I mean the fence between the two properties, so my property and Lot 46 -- when this fence was taken down, it opened up my back yard open.

THE COURT: Yes, I understand. Now, that fence that boarded on the back of Mr. Gruis' property, that was an old fence, was it not?

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THE WITNESS: It was an old fence, this was the one I was saying extended about a foot over onto my property. That was an old fence.

THE COURT: Well, you say he moved it eastward?

THE WITNESS: He tore it down and left it open.

THE COURT: But when he did put it back up, he moved it, you say, eastward about a foot?

THE WITNESS: That is correct.

BY MR. WAGMAN:

Q. I show you Defendants' Exhibit No. 26 for identification, a photograph, did you take that photograph? A. Yes.

Q. What does that photograph show? A. It shows the area where Lot 46 borders my lot and where the old fence we have just been talking about, that ran north-south, stood.

Q. Where was that picture taken from? A. It was taken from --on my lot, approximately the center, rear.

MR. WAGMAN: May we offer this in evidence, Your Honor?

THE WITNESS: It was taken looking toward the rear of the apartment house.

* * * *

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BY MR. WAGMAN:

Q. What effect, if any, did the removal of the fence have upon your enjoyment of your property, your yard, between the period November 1962 and April 1963? A. Well, on this photograph that you just introduced here, if the fence that is still standing there is projected, the line of that fence is projected, across the rear of the apartment house, that is where the old fence stood except that it jutted out about a foot beyond. Now, when that fence was taken down, this opened my yard open completely and we had at that time and still do have young children, and by being opened in this fashion, why, the children simply walked from our yard straight into the back of the apartment house and up these stairs which at that time were in a very unsafe condition and we had to pull them down two or three -- well, I don't know two or three, several times, from up on the third and fourth floor of this building.

Q. How old are those children? A. Well, we had twins who are now short of three years old so they were between one and two years old at that time, I guess, and Jimmy was probably two or three, and Mary Kay was three or four, and then, unless you want me to give the ages of all these children --

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Q. By the way, how old is your house? A. To the best of my knowledge, it was constructed around or just after the Civil War.

* * * *

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Q. You testified yesterday that you had sent a letter to Mr. Gruis in December of 1960, prior to the purchase of the Folger apart-

ment by the plaintiff, to the effect that the use of the right of way by the Folger apartment, owners and tenants, was permissive, is that correct? A. That is right.

III 263 Q. Upon what did you base your assertion at that time that the use was permissive?

MR. WILKES: I will object to this unless it is based on personal knowledge.

MR. WAGMAN: We can answer that, Your Honor. This would be an answer of personal knowledge, he would have to obtain it from some place. I will add the words, "if you know".

THE WITNESS: My deed called for a right of way for the benefit of original Lot a and Lot B.

THE COURT: Two and?

THE WITNESS: And B. I was completely and fully aware of the use being made by the Folger apartments of this strip of land in the rear of my property. This was not any burden to me, because other people were using it and I was using it myself, so I permitted this to continue.

MR. WILKES: Objection, if Your Honor please. I move that the word "permitted" be stricken.

THE COURT: The objection is sustained. It will be so stricken.

THE WITNESS: Well, I didn't --

MR. WILKES: There is no question pending, if Your Honor please.

THE COURT: Put your next question.

III 264 BY MR. WAGMAN:

Q. To your knowledge, was there an easement by grant to the Folger apartments or Lot 64? A. There was not.

Q. To your knowledge, did you know how the use of the easement by the Folger apartments or through the Folger apartments had started?

MR. WILKES: I object to this, if Your Honor please, unless it is based upon personal knowledge.

THE COURT: Well, if he knows, he can answer.

THE WITNESS: I do not know how it began. I knew Mr. Reed Liggitt, who owned the apartment before Mr. Gruis, we were friendly and there was no reason for me to disallow him the use of this property.

BY MR. WAGMAN:

Q. Did there come a time when you had reason to believe that the easement by grant had been put on your deed in error? A. Yes.

Q. And when was that? A. It was after the beginning of this action.

Q. And how did that knowledge come to your attention?

MR. WILKES: If Your Honor please, if this is based upon personal knowledge of the facts and circumstances in 1919 I have no objection. I will object unless it is based upon personal knowledge. The equity proceeding is in evidence in this case, and, of course, that speaks for itself.

* * *

CROSS-EXAMINATION

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BY MR. WILKES:

Q. Mr. Ishee, you stated on direct examination that sometime between the time you purchased your house in 1957 and the time you moved in, you removed a fence that was somewhere north of the right of way area colored in yellow on Plaintiffs' Exhibit No. 1? A. I don't remember exactly what my statement was or whether your phrasing of it is correct, but I did remove a piece of fence that ran in this general direction.

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266 Q. And then there came a time when you constructed another fence north of the right of way which ran in that general direction, is that correct? A. That is correct.

Q. And when was that? A. That was in 1957.

Q. 1957? A. Yes.

Q. And then there came a time when you took that fence down and constructed the obstructions which were removed under the temporary restraining order, is that correct, sir? A. I never constructed any obstructions.

Q. Well, what you would like to refer to as gates that were taken down pursuant to the temporary restraining order, there came a time when you removed the second fence, north of the right of way, and put up what you refer to as gates, is that correct, sir? A. Part of the materials -- this is generally true and I will explain. Part of the materials that came from making those gates came from that fence. Part of the materials were new materials, the gates

were made from this material and weren't heavy, they were light, which I could pick up and carry myself, as I did one time when somebody took one down the alley and deposited it --

THE COURT: Mr. Ishee, he isn't trying to find out the material that made this up, what he was trying to find out is just merely whether you put up a fence or gates, or whatever they were.

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MR. WILKES: No, if Your Honor please, I was interested in finding that he did use the oak that he testified that he put in the fence somewhere around 1957 that he built along this line, he took that down and used that wood to build the fence in August of 1962.

THE WITNESS: Part of this was from that fence, part of it was pine sheathing.

BY MR. WILKES:

Q. I show you what has been marked as Plaintiffs' Exhibit 45 for identification and ask you, sir, if what appears to be the remains of a fence in the lower right-hand corner is where you took the boards, in part, to build what you refer to as gates in August of 1962? A. Well, I can't tell from this photograph what that is. I will confirm that I took from this fence some boards and some of them were used to construct these gates.

Q. Well, you are very familiar with this, right behind your house, are you not, Mr. Ishee? A. Fairly familiar.

Q. What is this down in the lower right-hand corner that runs along the area in yellow? A. From this photograph, I cannot tell.

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Q. You cannot tell. Mr. Ishee, I show you what are in evidence as Plaintiffs' Exhibits 34 and 40 and ask you -- I point out to you what appears to be several uprights north of the right of way area, with a crossboard somewhere along the top, that is, I am referring to Plaintiffs' 34 and I also refer to Plaintiffs' Exhibit No. 40, and show you in the background, north of the right of way, some of those uprights and a board across the top, and now I will show you again what has been marked for identification Plaintiffs' Exhibit No. 45 and I will ask you if that, in connection with the other two photographs already in evidence, helps you to understand whether or not this-- A. I understand what you are getting at, but I can't testify.

Q. -- is what you took down?

A. I understand what you are getting at, but I can't testify that this is what that is. You describe it as such and it might be, I can't testify that it is or is not.

Q. And this is in your back yard? A. That is correct, but I can't tell from these photos what this is.

Q. You recognize these things that you refer to as gates as what you put up in August of 1962, in all three of these, do you not, sir? A. That is correct, I can see that very plainly.

Q. And you say that you took down boards, some of the oak you said, from the north side of the right of way line? A. If you want to see approximately what part of that material is here, I believe at the time these pictures were taken, that part of the material that is painted white and has a mark across it, came from the previous fence. These that are not painted white are pine boards, one was sheathing and it appears also in this Exhibit No. 45, you can see the pine boards here that were new and that were put in, so it was partially pine and partially oak. If you notice the white part, those are the pieces that came from the old fence because it had been painted white already; these boards had not been painted.

Q. At any time between August of 1962, when you put up what you call gates -- A. Well, they are gates.

Q. -- was there any post that ran along the north side of the right of way area other than that from which you took the old oak boards -- strike old, from which you took the oak boards? A. I am not sure that I understand your question.

Q. In the interval of time between August of 1962, when you put up what you call gates, which appear in each one of the photographs before you, and the date when the Court ordered you to take down -- pardon me, issued a temporary restraining order with respect to the removal of those gates, was there anything along the north side of the right of way, during that interval of time, other than that part of the structure of the fence from which you took part of the material to build what you call gates? A. Was there anything?

Q. Anything that was part of a structure of the fence from which you took the boards in this area of the right of way? A. This entire fence was taken down.

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Q. You are saying that no part of the fence which you took down appears in any of these photographs which are before you? A. No, I am not saying that because I don't know when these photographs were taken. And when these gates were built, at the same time they were being built, the other fence was being taken down.

Now, if this was taken very quickly, and I think it must have been, I don't know what the situation might have been with that other fence. But it, in general, came down at the same time that the gates were put up.

Q. You say you don't know when these photographs were taken. They couldn't have been taken before August of 1962, could they? A. It was after the gates were put up.

Q. Right, and they couldn't have been taken after they were re-located, could it? A. No.

Q. So it happened sometime between the time you put the gates up in August of 1962 and the time when the Court ordered that they be taken down, isn't that correct? A. Yes, that is correct, and I notice at the same time here that the gate in Mr. Gruis' back, to the back of his property, is off also, so this would have to be in that time.

Q. Now, since you mentioned it, Mr. Ishee, at the time you took down the old fence at the north side of the right of way and put up what you call gates -- A. It was not at the north--

Q. Just a moment, let me ask my question, please. At the time you took down the fencing north of the right of way and erected in August of 1962, approximately, what you call gates, there was no gate in the opening of the fence leading to Gruis, was there? A. There doesn't appear to be on this photograph. The gate was standing, I am fairly certain it was standing and it was immediately after these photographs were taken, I think, that I replaced the gate.

Q. Then you replaced the gate sometime after August of 1962, is that right? A. I was about to add here, I don't know exactly whether it was after -- yes, I believe it was after the gates were constructed here that I did also replace this gate in the fence between Gruis and myself. I believe it was after, at least one of the times that I put the gate back on was after these pictures were

taken.

Q. After August of 1962? A. Yes, to keep the kids in the yard.

Q. You moved into the house in 1957 -- I withdraw that question. After what you call gates were removed pursuant to the temporary restraining order of this Court, you then reconstructed what you call gates, at what location? A. Generally along the north side of the yellow strip on your chart.

Q. Now, when you did so, did you put them closer to the north end of the right of way or farther from the north end of the right of way than the fence that was removed by you when you put the gates up in this location along the west end of the yellow area and the south side? A. I think I testified yesterday, and I think this will make it clear to you, that the other fence ran off at an angle from the yellow strip there and for several feet, so when I put the gates up after this action was undertaken, I put these gates up back along-- I put them up close to, within inches of the yellow line on the chart. Does that answer your question?

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Q. I show you what has been marked as Plaintiffs' Exhibit 46 for identification and I will ask you to compare it, sir, with the photograph that we discussed before, marked 45 for identification. I will ask you if they appear to be taken from this property that is involved, some of the property that is involved in this suit. Do you recognize any part of it that identifies anything involved in this suit? A. Yes, yes. I recognize Mrs. Schreiber's fence over here and this fence that Mr. Gruis constructed here and--

THE COURT: Mr. Ishee, it is hard to understand you. Speak a little louder, please.

THE WITNESS: Well, I recognize the fence that Mr. Gruis constructed after he had taken mine down and I recognize the gates here that were constructed, these gates here are fairly close to the twelve-foot that we are talking about here, to that north line, these gates here, this line here, across the photograph.

BY MR. WILKES:

Q. Now, Mr. Ishee, would you approach -- step around here, so Her Honor might see specifically two spots on these photographs, please. Now, on Plaintiffs' 46 for identification, the white criss-

cross fence is the fence which you relocated, after the temporary restraining order, to the north of the right of way area, is that correct, sir? A. That is correct, yes.

THE COURT: Which is that?

III 274 THE WITNESS: This is the right of way area here with the trash can sitting on it.

BY MR. WILKES:

Q. Now, this telephone pole which is just about up against Gruis' new fence, you recognize that, don't you, sir? A. Yes.

Q. Now, directing your attention to Plaintiffs' Exhibit 45 for identification, you recognize this photograph, don't you, sir?

A. Yes.

Q. But these wooden items that appear to be white in color in the lower right, do you say you can't identify those as being what was at the north side, that you took down in part to build what you call gates in August of 1962, is that right? A. You say it is a wooden something that appears to be white. Now, this is about how it appears to me. I don't know whether it is wood, steel, whether it is on the ground or what it is, I simply can't tell, and I thought I had answered that question, that I can't tell.

Q. And Plaintiffs' Exhibit 34 that is in evidence, directing your attention to what would appear to be upright and crisscross in the same general location, you can't identify what that is, either, is that right? A. That is correct.

III 275 Q. And you can't indicate that that has any bearing or relationship with what is shown in the lower right-hand corner of Plaintiffs' Exhibit No. 45, is that correct? A. That is correct.

Q. But you lived at this house and slept there every night during the period August 1962 through the time that the temporary restraining order was issued, didn't you? A. I doubt it. I don't think that I slept there every night, no.

Q. I mean this was your home, was it not? A. Yes.

Q. Substantially, you slept there every night, did you not, Mr. Ishee? A. No, I don't know, I was out of town.

Q. How frequently?

* * * *

III 276 Q. Mr. Ishee, there is no question in your mind, is there,

that when you put up the relocated gates after the temporary restraining order, you put them closer to the right of way area than the fence had been before, is that right? A. That is correct, by several feet.

* * * *

Q. And the relocated gates, after the temporary restraining order, that was closer to the right of way is what you say was knocked down by some tenant coming out of the garage? A. The gates that were relocated?

Q. Closer to the right of way, that's correct. A. Closer to the right of way were knocked down by one of the tenants, yes.

Q. Now, when you relocated what you call gates closer to the right of way, after the temporary restraining order, you actually moved part of it south of the area which was paved, isn't that correct, sir? A. No--

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Q. There was no part of the paving, the old cracked up paving that was laid in the right of way, north of where you relocated the fence after the temporary restraining order? A. There is no paving on the right of way beyond where the garages are; beyond where the garages are, there is no paving. The paving that exists and had existed, was in front of the garages.

Q. I show you your exhibit 21 and ask you if this area here indicates part of the old broken up concrete that is actually to the north of the fence or gates, as you would call them, that you relocated closer to the right of way than the old fence that was taken down? A. Well, from this photograph, I can answer your question specifically. If you will note where the posts are, none of those posts were put on the right of way, nor were they put in the paved area. Now, this gate as it now exists, after it was hit by the car and broken in two, it does stand out over, I think, what appears to be, I don't know, but it appears here to be and I think it probably is, it is out at an angle, which you can't tell from the photograph, but it has to be out at an angle in order to get over some of the concrete and I think the end of the gate to the west is probably on part of the concrete, but the posts themselves were not.

Q. The line of the posts, as you relocated them after the temporary restraining order, there is no part of the cement paving, that

III is worn down, that is north of that fence that you relocated after
278 the temporary restraining order? A. That is correct. Those gatees, as relocated, stand within a foot, it is a matter of inches from the right of way line.

Q. Now, Mr. Ishee, you referred to the removal of a fence by the contractor renovating the Folger apartments for Mr. Gruis? A. I believe I said workmen or the carpenters.

Q. Now, as I recall your testimony, you stated that they were about to put the new cedar spring fence in about a foot to the west of where they actually put it in? A. Apparently he intended to do that. I don't think he ever -- I don't remember specifically whether he ever did actually start any construction on it, but I saw the carpenter out there, so I told my wife that I think we probably ought to tell him that if he is going to, after he has town down our fence, if he wants to put one of his own up, he should put it over on his own property. So this she did, and the carpenter could tell by looking at the line of the houses, and so forth, that the fence, to get on the property, would have to be set back considerably, so this he did but, as I say again, he still didn't get it over entirely onto his own property.

Q. Did you have a surveyor, who was there at about the time the new fence was going up? A. No, if I remember correctly, I wouldn't be certain on this but the record will show it, but I believe that the survey that I had made, was made before that fence was erected and, of course, this is --

Q. Before the new fence was erected? A. That is correct, and Mr. Gruis had one made after the fence was erected. Both surveys corroborated each other, they came out exactly the same, that the new fence sits over on my property.

Q. So when Mr. Gruis' contractor was constructing the fence, you told him to move back to the point where you had taken the survey, is that right? A. I didn't tell him to. I suggested to my wife that she suggest to him that if he wanted to build himself a fence, he ought to do it on his own property. And I think she pointed out to him the pin that was put in the fence by the surveyor who surveyed -- who we had engaged to survey the property. He had put a pin in the stringer on Mrs. Prettyman's fence, her fence sets also

about two to three inches, it is a party fence between Mrs. Prettyman and I, this fence is a general extension of that line, but I had no -- there was no privity between Mr. Gruis and myself in his putting in this fence, so it is not, as I understand the District Code, it is not a party fence, he has to have my permission to put in a party fence.

Q. Did you contact Mr. Gruis, at the time you observed the man about to put the fence up about a foot to the west of what you say was the line? A. No.

III 280 Q. You talked to the general contractor? A. My wife talked to him and I observed her talking to him.

Q. Was he cooperative in this respect? A. Well, it wasn't a matter of cooperation. I did it as a neighborly gesture to him, if he was going to put up a fence, he would probably want to build it on his own property, I didn't think he'd want to build a fence on my property. So I did it as a neighborly gesture to him to assist him in putting his improvements on his own place, I didn't think he wanted to improve my place. So he did move back.

Q. After the nails were pointed out, he did move back? A. Not far enough, but he did move back some.

Q. You say he moved back about a foot? A. Approximately. That's about the extent that the old fence was standing on my property.

III 281 Q. So, where he was about to build the fence, before you said move back, he was about to build it where the old fence had been located that Mr. Gruis took down, is that right, sir? A. If you will notice, sir, I didn't say that he was about to build the fence there. I saw the man out there and he apparently was going to build a fence, because he had some materials and he was measuring back and forth. Now, exactly where he intended to put that fence, I don't know, but I told my wife that, in any case, she probably should tell him, point out to him the survey and tell him that it would -- and show him that he probably ought not to be building a fence on our land.

Q. Now, you said when you bought your house, you came in and you saw that the fence that Mr. Gruis took down was west of your deed line, is that right? A. Well, I didn't say that, when I bought

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III 281 Q. Now, you said when you bought your house, you came in and you saw that the fence that Mr. Gruis took down was west of your deed line, is that right? A. Well, I didn't say that, when I bought

the house, I did; I said I have observed this many times and anybody looking at it, could see this. It set--

Q. And you inspected your property before you bought it, didn't you? A. Yes, I don't know whether I noticed this particular thing about it, but as I say, the fence was obviously west of the property line.

Q. Now, you say that the removal of that fence opened up the area and exposed your children to open yard conditions, is that right, sir? A. Well, primarily to the open porches and railings that are on the back of the apartment house. With small children, it is difficult to control them in any event and, with this opened up, this was a great game to them to get over and go up these steps, three or four stories high.

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Q. Before Mr. Gruis removed that fence, your children were customarily or frequently playing in the public alley, were they not, sir? A. I don't believe, sir, that you could say customarily; as I say, children are hard --

Q. Frequently? A. Infrequently, I would say.

Q. From time to time? A. At times.

Q. Sometimes observed on top of the garage roofs? A. This, I have heard that on two or three occasions, they were on top of the garage roofs.

Q. Sometimes played up and down D Street on the sidewalk? A. No, sir.

Q. Never played on the sidewalk along D Street? A. I think I could almost categorically -- we are very strict on them going out the front because you can't trust a small child out on the front, because he might run out in the street. But if I may say so with a little pride, our children are better behaved than most and they don't play on D Street, on the front.

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Q. Did you have an enclosed back yard before Mr. Gruis removed his fence? A. We have, over the period of years, had many enclosures, I thought of this after you had asked me some questions along this line in the deposition. And there were -- I don't know how I answered you then -- but I will say that I am not sure that I pointed out that we did have various enclosures in the yard, the side of the yard was enclosed at one time and over a time, this changed. We al-

so put wire across the opening in the fence toward the rear of the lot at times, and in various ways we were able to keep the children contained, in one way or another. Now, they were -- the alley seemed to enchant them and at times, they would get out and go down the alley and we endeavored to keep them in my property. They were never, to my knowledge, in the apartment house area until the fence was taken down.

THE COURT: Now, Mr. Ishee, I think that you overlooked the precise question. Read the question, please.

(The question was read by the reporter as follows:

"Q. Did you have an enclosed back yard before Mr. Gruis removed his fence?"

THE WITNESS: There were times, after we lived there, that it was not totally enclosed, but there were times and at the time he took the fence down, we did have.

BY MR. WILKES:

Q. Now, directing your attention to page 76 of the deposition, where I was questioning you: "Did you have a fenced in back yard at the time you moved into your house? A. No, not completely fenced in. Q. When was the first time you fenced in the back yard? A. Completely? Q. Yes. A. When I put up the gates which were moved on the basis of the injunction." You recall that testimony, do you not, sir? A. Yes.

Q. Now, you have testified on direct examination that the type of tenancy changed during the interval of time that Mr. Gruis took title to the Folger apartments, and the time you put up the gates in August of 1962? A. I don't think I testified exactly that. You say I testified that the type of tenant changed. I said the behavior of the tenants grew worse. I will explain this, if you like. I would also say that -- I would think that the general caliber of the tenants did go down, would be my opinion, they were worse as far as nuisances. They would sit out on the back porch and eat crabs and throw the crabs over into my yard, or park their cars on the right of way and although usually, before, when the cars were parked on the right of way, we could ask -- we would find out who owned the car and ask them to move it so we could get out or in, but these people, there came a time there that they were abusive, and so forth,

when you would try to get them to move their cars from the right of way.

Q. Now, this is between 1961 and up to August of 1962, is that right, that you say that this big change came about? A. No. You phrase me a little wrong. I didn't say a big change came about. I said that it grew progressively worse and it was before this time and I don't mean strictly to tie this in with Mr. Gruis' acquisition of this property. This, I don't know or care, actually. It was just that the situation got so bad that I felt that I had to do something in order to take some kind of control of it.

Q. As a matter of fact, you knew, didn't you, Mr. Ishee, that Mr. Gruis, with a group to which you were invited to join in, was buying this for the purpose of clearing out all the tenants and renovating and rehabilitating this building? A. That was his stated purpose, as far as I knew.

Q. And you heard Mr. Gruis state in his testimony before this Court that as soon as they were able to get financing for the Seventy-some thousand dollars in reconstruction, that they proceeded with that reconstruction, you heard him say that, did you not, sir? A. Something generally to that effect, I think.

Q. Do you have any reason to doubt that? A. I just don't know that your statement of what he said is exactly what he said.

* * * *

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Q. I show you what has been marked as Plaintiffs' Exhibit No. 47 for identification and ask you if you have ever seen an original of that, sir? A. I am fairly certain that I have.

Q. Do you know your wife's signature? I show you the pink slip for the registered receipt and ask you if that bears your wife's signature? A. I have no reason to doubt that it is her signature. I couldn't identify it definitely, but I would admit that it is.

Q. As a matter of fact, Mr. Ishee, you are sure you have seen the original of this letter, aren't you? A. I am fairly sure, yes.

Q. Still just fairly sure, however? A. Well, this is a carbon copy, it could have been a letter that was typed and was different, this I don't know, but I will admit that I have seen the original, I have no reason not to admit it.

MR. WILKES: I offer in evidence Plaintiffs' Exhibit 47.

* * * *

III 287 MR. WILKES: I would like to read this, if Your Honor please.
Letter, September 24, 1962, certified mail, signed by James C. Wilkes,
Jr., addressed to Mr. and Mrs. Tommy C. Ishee, bearing a return re-
ceipt which purports to be signed, "Mrs. T. C. Ishee."

Dear Mr. and Mrs. Ishee:

This is to advise you that this firm has been retained by the owners of all property abutting the right of way over the rear of your lot, improved by premises 149 D Street, S.E.

Demand is hereby made that you remove the obstructions to said right of way, recently erected by you, on or before September 20, 1962.

This firm has been instructed to take the necessary steps to eliminate said unlawful obstructions and to compensate our clients for damages resulting from your unlawful erection of said obstructions, in the event that you do not comply with this demand.

BY MR. WILKES:

Q. Subsequent to the receipt of that letter, did you remove what you call gates? A. No.

Q. When were they removed, sir? A. I never removed them.

III 288 Q. Do you know when they were removed? A. They were removed after the preliminary -- I guess it was a preliminary restraining order or preliminary injunction was issued.

Q. Would it refresh your recollection if I said that it was removed not after the preliminary injunction, but immediately after the temporary restraining order of May 20, 1963? A. That is correct.

Q. Now, you say that after the removal of what you call gates, after the temporary restraining order, almost continuously there has been parking in the Connor garage, which you say is rented by several men? A. Of 172 North Carolina.

Q. Of 172? A. After the gates were removed, there has been almost continuous use of this garage and the right of way, also, for parking.

Q. Now, with reference to a specific period which I will identify, namely, from the time of the erection of what you call gates in August of 1962, up to the date when those things which you call gates

were removed, upon the issuance of the temporary restraining order, was any car ever parked in that garage, to your knowledge? A. Neither then nor several years before -- or several months or years before. It wasn't in use when I put up the gate.

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Q. You say several months to a year? A. The only time that I ever--

Q. Just a minute. You say several months to a year, is that what you said? A. I said I think, yes.

Q. In your direct testimony, you said that you weren't very good on dates, isn't that right? Well, I am fairly good on -- well I am not maybe good on time or dates, I don't know that I said I am not very good on dates, but as far as remembering the year over time past, the specific time, I can put things fairly well in sequence, but remembering the years, I am not particularly good at, I wouldn't say. This is a personal appraisal, though, and I don't know how good that is.

Q. The fence which Mr. Gruis removed along the back of his property, what condition was that fence in when he started to take it down? A. You mean you want my evaluation of whether it was in good condition or bad condition?

Q. Was it in new condition, was it -- A. No, it was an old fence.

Q. Was it in good condition? A. Well, it had some -- I would say it was in -- if I'd give my personal evaluation, I'd say it was in fairly poor condition.

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Q. Fairly poor condition? A. It wasn't in terrible condition, but it was an old fence.

Q. And the fence which Mr. Gruis put up, that was an old fence of old boards, or what was it? A. Well, this was a -- I believe he calls it a stockade fence, which is less expensive than a board fence. I might point out, a board fence is more expensive than picket fencing.

Q. Now, would you answer my question. Was that a new fence made of new material, or was it an old fence? A. It was a new fence made of new material.

THE COURT: Mr. Ishee, along that alley there, indicated in red, these people that live there, have you observed where they put their trash and garbage?

III
291 THE WITNESS: Generally, I believe that most of the people have an inset into their lot and build a frame holder for the trash cans and set the trash cans in these and they set there all the time.

THE COURT: Where do you put your trash can?

THE WITNESS: Back on my lot in what would be the southwest corner, off the right of way; in other words, the southwest corner of my lot, but north of the yellow, I'd say. And the District comes in and picks it up. As I understand the District Code on this, you are not allowed to set trash cans out in the alley or they come in on your property and they pick the trash up and that is where mine stays.

BY MR. WILKES:

Q. Mr. Ishee, I will show you Plaintiffs' Exhibits 34 and 40 for identification: first, No. 34, is this where you put your trash cans?

A. No, sir, that is not mine.

Q. Whose is that? A. I couldn't say.

Q. Where would you put yours? A. Mine sits back here on my lot off of the right of way, back in around, not -- you can't see it in this picture but they are back around here, inside the gates and inside my lot entirely.

Q. You never put them, in any respect, in the right of way? A. No, sir. The District comes in and picks them up off my lot. Why should I bother to put them out? They come in and take them off my lot.

Q. You never put them in there at all? A. No.

Q. Do you put out the trash? A. My boys do, but I know where it is, it is back here and I am certain they are so lazy that they are not going to set it out when they don't have to.

Q. I see. That same would apply, would it, to Plaintiffs' Exhibit No. 40? A. Yes. This is behind Mrs. Grigsby's area there, I don't know whether that belongs to her or to whom, but not to me.

Q. You would recognize your trash can, I guess, would you? A. Well, I don't know. It doesn't have any great personality.

MR. WILKES: No further questions.

REDIRECT EXAMINATION

BY MR. WAGMAN:

Q. Mr. Ishee, the gates that were put up, what type of material

were they made from? A. They were --

MR. WILKES: I object, if Your Honor please, this is repetitious, he said it was made of oak, partly from the old fence, I have no objection excepting for the fact that it is redundant.

THE COURT: He has gone into this.

MR. WAGMAN: Your Honor, I will strike that.

BY MR. WAGMAN: Were the gates heavy? A. They were light enough that we had trouble keeping them closed because the breezes would just blow them open, would wave them open and they'd swing open and we had to put hooks on them in order to keep them closed. And at one time, III 293 as I think I said earlier, somebody, some person unknown, took one down the alley and deposited it in a parking lot down there and I went down myself and brought it back and hung it on the hinges.

Q. Was there any difficulty in opening the gates, because of their weight? A. Not because of their weight, but I will say this, I noticed in the testimony of some of the plaintiffs that they found the gates difficult to open. With all due respect, the only -- there did come a time when other children and my children, also, swung on the gates and there did come a time that the gates, particularly behind 172, were pulled over and down and hung on the ground, so that you had to lift them and this was a little difficult, so I had a man come in and shore these back up as they swung free. But as long as they swung free, my three-year-old child -- one of the reasons I still had difficulty keeping them out of the alley, because they would open the gates and go out themselves.

Q. Your children who swung on those gates and played in the alley, how old were they at that time? A. Well, I have them all ages, Mr. Wagman. At that time, from one to two years old on up to eight, nine, and ten.

Q. And all the children used the back yard, did they not? A. Yes, and the side yard.

III 294 Q. Now, along the right of way, east of the Connors' garages, how wide is that right of way? A. East?

Q. At the present time? A. East of the Connor's garages--

Q. Toward the Gruis property? A. Well, it used to be, if you take the line, the red line and extended it straight on up to Mrs. Horton's line, that is where it used to be. Now, since Mrs. Schreiber

built her fence, she moved it out about three or four feet, so you get a - just in there, it comes up and so, behind her lot, it is only twelve feet wide; in front of the garages, it varies somewhat, but approximately it is twenty feet, I think.

Q. Is there any path leading from the back door of your house onto the right of way -- to the right of way? A. Any path?

Q. Any pathway leading from the back door of the back of your house to the right of way? A. There is, yes.

Q. Are there any materials in that path or what is it made of?

A. It is made of brick.

Q. Does that lead down to the right of way? A. Yes.

III 295 Q. Now, when you moved the gates and relocated them, were they placed completely off the right of way? A. Yes.

Q. Now, did there come a time when the D.C. Surveyor surveyed a portion of your property, that part that abuts or adjoins that of Mr. Gruis? A. Yes.

Q. Did he set any marker up? A. He did.

Q. Did he set up a stringer? A. Well, he set a marker in what I call the stringer of the fence. In other words, there is a two-by-four that runs from the posts, runs between the posts, to which the pickets are nailed, and he set a marker in approximately the center of this two-by-four stringer.

Q. Was there another marker set at the other end of that fence, on your property? A. I don't know, actually it seems to me that in building that thing they widened Mrs. Horton's gate, she only had about a two-foot, eighteen-inch or two-foot gate, something like that, it was quite narrow, and they widened it to something like three and a half feet, maybe, so in order to do this, they swung the fence back. Now, where the marker is on that end, I am not sure, but it would have to be outside -- I believe the survey that was entered in evidence here showed that it was about ninety-six hundredths of a foot back from the corner.

MR. WAGMAN: No further questions.

III 296 BY MR. WILKES:

Q. By back from the corner, you mean to the east of Gruis' deed line and your deed line? A. Right.

RECORD-EXAMINATION

Q. Mr. Ishee, did you or your wife, or anyone acting on your behalf, also plant any growing matter in the right of way area? A. Well, I noticed and I couldn't get my point in at the time of the restraining order or injunction, that this claim was made. Now, this might have been a mistake on the part of the people making this claim because they didn't know where the right of way line was. Actually, we put some shrubs outside of where that old fence was, but this still was not on the right of way. Now, there is, however, I think two small bushes, approximately the size of my little finger, that sit right up next to Mrs. Schreiber's fence. That, as far as I know, is the only shrubbery on the right of way itself. The other shrubbery actually, that we did put in, bushes, are actually off the right of way and to the north of it.

Q. Now, when you talk about Schreiber, you are talking about this property right here? A. Correct. There are two small bushes, as I say, approximately the size of my finger and they run straight up, that are right next to that fence line.

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297 Q. Bushes or trees? A. No, they are almost single strand bushes that run up, maybe, four feet high, there are no trees.

Q. And you people planted that there, is that right? A. I believe my wife planted that there, I didn't myself, I believe she did.

Q. Now, you say that the Schreiber fence encroaches somewhat on the right of way? A. Yes, it does.

Q. About how much? A. It is a matter of inches and it varies because it is not on an exact straight line. The results of the survey indicated down where her gate is, I would say in my opinion, there it encroaches maybe six inches or more, and up on the other end, it is not as much, there is maybe an inch or two or three up there, I don't know.

Q. When you said three to four feet before, you mean Schreiber's sits out three to four feet more than the garages where they are set back, is that right? You said three to four feet, on direct examination. A. That is correct. No, when she built her new fence, when she was remodeling it, she didn't put it back where her old fence was, she moved it out about three or four feet into what was then open ground, which was a straight line up by the alley. When her old fence

existed, if you run that red line on up just to miss the garages and straight on through Mrs. Horton's property, that is where her fence was, it set back on an even line with the garages, more or less. But when she built the new fence, she moved it out to encroach on the yellow area on the chart.

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Q. Now, the trees that you are referring to are in the area marked in yellow, are they not, sir? A. I didn't refer to any trees.

Q. Well, shrubs, growing matter, whatever you have there, the ones that you planted there. A. I said two small bushes about the size of my little finger do stand in the yellow area and were planted there by us. They don't interfere with anything, as far as I know.

Q. They grow, though, don't they, Mr. Ishee? A. Yes.

Q. As a matter of fact, one of them that you were complaining about in this suit grew quite a bit, didn't it? A. Tree?

Q. Yes, sir. A. Well, these aren't trees, they are bushes.

Q. What kind of bushes or shrubs are they? A. Frankly, I don't know. I am no expert on this, either.

Q. You don't know if it is a tree or a shrub, do you? A. Yes, I know it is a shrub, that much I can tell. I know a little more about trees than I do about shrubs.

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Q. Now, when you built what you call gates and what we call obstructions, did you build them high enough, in relation to keeping your children in? How high did you build them? A. I believe the gates themselves were four feet high.

Q. Four feet high? A. And they were swung above the ground about six inches, so the total of this would make them about four and a half feet high, I believe.

Q. And how long was each section of what you call a gate? A. It would be about eight feet.

Q. So they were eight feet long and four feet high, approximately, right? A. That is right.

Q. I mean the structure of what you call a gate? A. Correct.

Q. When it snowed, how in the world would you move it? A. Well, as I say, they were set up, they were hung up about six inches, so we very seldom have over six inches of snow and particularly one that you can't move back with a gate.

Q. But they were all hung up six inches? A. About, yes.

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Q. Now, you say the kids swung on them and they became loose and came down? A. They pulled the posts over, that is right.

Q. Were they six inches off the ground then? A. No, at that point they were actually, that was the time they got down on the ground and it was quite difficult to move them, but I had a carpenter come in and jimmy these posts back up so that he could put the gates back up, so they were off the ground again.

Q. So if the kids swung on them again and it snowed when they were down as they hung off eight feet, how would they be moved?

MR. WAGMAN: I think he is arguing with the witness.

THE COURT: I overrule the objection.

BY MR. WILKES:

Q. How, then, would they be moved? A. I don't know. The gates weren't so heavy that they couldn't be lifted back; in other words, you could lift them up. When the posts got pulled over, I think when I had the carpenter reset the posts and jimmy them up, I don't think they would pull over again, but if they did, you'd just have to have them fixed again, nothing is permanent in life, I believe. I have a front gate that doesn't swing six inches off the ground, and I don't think most people's do.

Q. During the snow, Mrs. Grigsby, Mrs. Schreiber and Miss Horton, they could pick up the eight-by-four gate and lift it off the hinge and put it over on the side, if they desired to go up there, was that your thought? A. That was not my thought, no, that is ridiculous.

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Q. Was it your thought they would shovel the entire right of way in order to be able to move them? A. I don't know how they would open their own gates to get out on the right of way.

Q. That's not my question. Now, you answer my question: What was your thought with respect to how they should treat that situation when we had a good snowfall? A. Well, since this area is a right of way, I suppose they would shovel the snow away from the gate enough to swing it back.

Q. I see. A. That would be my suggestion.

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MARYCLAIRE ISHEE

a defendant, called as a witness on behalf of the defendants, being first fully sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WAGMAN:

Q. Will you please state your full name and address? A. My name is Maryclaire McCauley Ishee, Mrs. Tommy C. Ishee, and my address is 149 D Street, S.E.

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Q. You are the wife of the defendant Tommy Ishee? A. I am.

* * * *

Q. You are the owner, jointly with your husband, are you not, of Lots 848 and 849? A. Yes, sir.

Q. When did you purchase Lot 848? A. I believe it was November of 1951.

Q. That is evidenced by a deed put in evidence by the plaintiffs? A. That is correct.

Q. When did you purchase Lot 849? A. I believe in July of this year.

Q. And how was that purchased? A. From the District of Columbia, it was a tax deed.

Q. How long have you resided in the premises, the building that stands on Lot 848? Since January of 1957, the end of January.

Q. Prior to January 1957, did you have occasion to visit the premises? A. Many times.

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Q. And what use was made of the building by you, prior to 1957 and your occupancy thereof? A. We had four tenants, there were four apartments in the building.

Q. During the time that you have lived in the building, did you have occasion to observe the use of the right of way by the owners of the Folger apartments or on their behalf? A. During the time that I -- since 1957, you mean?

Q. Yes. A. The only time, I think one day Mr. Gruis was out on the right of way and --

MR. WILKES: May we establish a time for this, if Your Honor please? If so, I would certainly not object.

THE COURT: Would you be able to fix the time?

THE WITNESS: Well, I can't fix the date but it was in

the Spring of 1962. It was the day I told Mr. Gruis I was going to have to put up a fence or something to stop all of this business at the apartment. And he said to be patient, he would very soon get to do something, and another several months went by and the situation got worse, and nothing was done, so then we put up the gates. That was, the leaves were not yet on the trees, it was spring, the leaves were not yet on the trees.

BY MR. WAGMAN:

Q. Did you have occasion to observe the use of the right of way made by the tenants of the Folger apartments? A. Yes, I did.

III 304 Q. Will you describe to us what use or uses the tenants made of the right of way? A. Now, is this before or after 1957?

Q. After 1957? A. The tenants went in and out, and their guests, many, many guests or visitors went in and out, and they, well, they used it as a general depository for trash and garbage and furniture and couches, and dogs, in fact anything you could think of was at one time dumped out there and I had to hire somebody to then haul it off.

Q. Specifically, between the period of December 1960 and August of 1962, did you have occasion to observe the uses to which the right of way was put by the tenants of the Folger apartments? A. Yes, sir, constantly. They, as I think my husband testified, the caliber or the habits of the tenants seemed to become progressively worse, and, for example, in the afternoons, oh, maybe ten or fifteen men, who had been working somewhere, would congregate on the back porches and they'd sit there and play cards and drink and just toss bottles out and they would smash on the right of way, and eat things, and they were generally noisy, but this was a general thing in the neighborhood.

III 305 Prior to the time that Mr. Gruis called the group together, the whole neighborhood, it was a disgrace, my husband had called a group together, including Mr. Krizek, we met in Mrs. Prettyman's apartment and my husband suggested that a group of us get together and buy the place and try to do something about it, because it was completely disgraceful.

And at that time or prior to that time, my husband had gotten an exclusive listing from Reed Liggitt and we had tried to

sell it, we had advertised it many times and tried to sell it, but we couldn't sell it at the price Reed Liggitt asked for it.

So, failing to sell it, but still having to do something about this horrible situation, my husband called this group of neighbors together and it was shortly after that, that Mr. Gruis, apparently not knowing that my husband had already called a group together, he called a group together. And I don't know whether it was Mr. Krizek or Mrs. Krizek or someone informed him that Tom had already had a meeting on it and so he invited, I presume this is the way, I think Mr. Gruis' letter said Mr. Krizek, so he invited my husband to attend the meeting. We were all of a mind that something had to be done about it, it was disgraceful.

Q. Now, directing your attention to the period between 1951 and August of 1962, did you have occasion to observe the uses of the right of way by Mrs. Horton? A. Now, as to the early years after we owned the place, I cannot testify, I was there infrequently. After we moved into the place, yes, I can.

Q. From 1957 on, to 1962? A. Well, Mrs. Horton had some remodeling work done and the workmen just simply dumped it out on the right of way, there was a great big pile of broken concrete, bric-a-brac and so forth. It sat there for quite awhile and finally, I hired Mr. Bates to come in and haul it away.

And this went on, I think a couple of times, and just this spring, we had an altercation over the thing. Mrs. Horton had dumped another lot of plaster and lath, and so forth, out on the right of way and I called her and asked her to remove it, because we couldn't even drive the car or couldn't even get into our own property.

Mrs. Horton said the District men would take it away on Monday and, if they didn't, she'd take care of it. I said the District of Columbia men are not going to shovel this, it's not in any cans, they are not going to shovel it onto the truck. She said, Oh, Yes, they will. So, all right.

This was on Saturday that I called her, and on Monday, of course, the District of Columbia men didn't shovel it up.

So, the following Saturday, I again called her and said, Mrs. Horton, a whole week has gone by, something has got to be done

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about this. She was quite upset, she had had some difficulty in her family, she said her mother was very ill and she couldn't be bothered by anything like this at that time, but she was going to have some workmen to haul away some things she had in front of the house and when they got to haul that away, she would take care of it. So I apologized for calling her at an unfortunate time.

That afternoon, Mrs. Prettyman had this workmen, Henry Gibbons, who was cleaning up her yard. So I called Mrs. Prettyman and said when you are through with Henry, will you send him over here. So Henry came over and he shovelled all of this plaster and debris, and so forth, up into boxes and I said, now, set it just inside Mrs. Horton's yard so it will be off the right of way, and when she has her men haul it off, they can take it, the right of way is cleared and it is in nobody's way.

Well, her gate was locked and he couldn't do it, but he set it against her fence, approximately against Mrs. Schreiber's fence where it could be easily moved into Mrs. Horton's gate. That was Saturday. Then I had Henry sweep the whole thing and rake it clear, so it was once more broom clean.

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The next afternoon, the children were in a May procession up at St. Peter's and we all went up to St. Peter's Church. We came back and looked out in back and here was all this plaster and rubble that I had had shovelled up into boxes and enclosed the previous afternoon, again strewn all over, plus garbage, trash, old carpets, I think there was an old broken chair, in fact the right of way, which had been broom clean the afternoon before, was just littered. I am afraid I was not very happy about this situation. I was very angry about it.

I called my husband and went out in the back and there were two lengths of paper sacks, about this size --

THE REPORTER: Paper sacks?

THE WITNESS: They were paper sacks, broken sacks, and I knocked at Mrs. Horton's gate, I heard noises inside and I knocked at her gate and called and nobody said anything. Then I took the paper sacks and I put them over her fence, at which time apparently some of it must have fallen into Mrs. Schreiber's, the fence is higher than my head and I simply put it over the fence. And Mrs.

Schreiber and her friend and -- I didn't mean to interrupt, I don't know who frequents her at her house, they became quite abusive and Mrs. Horton came out and we had quite an altercation.

My husband came out and suggested that Mrs. Schreiber's friend had no say in the thing and we called the police, and the police ordered Mrs. Horton to remove the debris.

THE COURT: Ordered Mrs. Horton to do what?

THE WITNESS: To remove all the plaster and lath from the right of way.

BY MR. WAGMAN:

Q. Between December 1960 and August of 1962, did you have occasion to observe the use of the right of way by Mrs. Schreiber? A. III 309 Yes, I did.

Q. And will you describe those uses? A. Well, Mrs. Schreiber seldom walked on the right of way because her gate, she has no opening from her fence onto the right of way, she walked generally, this is from my observation, on the area in front of the garages -- is that clear? I think I have a picture which might describe it.

Mrs. Horton is in the habit of putting her trash can out, she was never unsightly in putting out her trash can, I will say she was fairly neat, and so forth. But she did put out a tree strump which blocked the -- she didn't put it out, the workmen did, why they didn't, after they had dug it up, why it wasn't loaded onto a truck and removed, I don't know, but it stayed here for eight, nine, ten months.

After it was there for some time, we had it moved to the side because you couldn't drive onto the right of way and asked Mrs. Horton to have it taken away and it was not --

Q. Asked who to take it away? A. I mean Mrs. Schreiber, I am sorry, and she also had some cord wood, I guess, that had been cut from the trees, back against the fence, and I know on one occasion the children came in to me, and this was when we had the old fence that stood about seven feet in from the right of way, I measured it, and it is about seven feet in, I had forsythia bushes III 310 and rose bushes planted inside the fence, but they had protruded through the fence, and the children came in and said Mrs. Schreiber suggests that you cut off the branches of the bushes through the

fence. But I didn't, because they were not on the right of way, they were seven feet within our own land.

Q. Where was that cord wood stacked? A. On the right of way against Mrs. Schreiber's fence.

Q. To your knowledge, did Mrs. Schreiber have any visitors who used the right of way? A. Yes, On one occasion, Griffith Consumers served both Folger apartment and us and had for, well, I know they had served us since we bought the place and since we moved into the place, they were serving the Folger apartment and I knew the driver quite well. And one day he came in to me and he said, Mrs. Ishee, isn't the land out in the back, isn't that your land? I said, yes, it is. He said, well, there is a gentleman out there and he has ordered me not to drive the truck -- that day the truck had a delivery of oil for the apartment and for our place, which was very often the case, he would deliver to us both simultaneously.

He said he won't let me drive the truck on the land, I can't deliver the oil. I said, who the dickens is that? He said, I don't know. He said that it is his land. So I went out and it was this friend or visitor of Mrs. Schreiber's.

THE COURT: A visitor of whom?

III 311 THE WITNESS: I don't know who he is, he is a very frequent visitor at the home of Mrs. Schreiber and he told the driver--

MR. WILKES: Just a minute. I object, if Your Honor please, what a friend of Mrs. Schreiber's whom she can't even identify --

THE WITNESS: I can identify him, I don't know the name

MR. WILKES: -- may have told to a truck driver bringing fuel in, is irrelevant and immaterial, I respectfully submit.

THE WITNESS: He said it was his land. He stopped the truck driver because he said it was his land and that is why the driver came in.

THE COURT: The objection is sustained.

THE WITNESS: And on another occasion this summer, I have the date there, the same friend of Mrs. Schreiber was painting her side fence and back fence and he and another man parked their car on the right of way all day long.

BY MR. WAGMAN:

Q. Now, directing your attention to the Connor's properties,

do you know who has been living in those properties since your occupancy of 149 D Street, S.E.?

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312 A. Yes, pretty well. The Catrells lived in 170 and the Clarks used to live in 172, I think it was 172, and then there were a group of young men, the occupancy always seems to be changing. Now, I think there is a group of Senate or House of Representatives pages, there are a lot of fairly young boys. I do not know their names.

Q. To your knowledge, have the Catrells used the garage to the rear of their property? A. Not since they have been in it. You mean store cars?

Q. Well, for what use have they put the garage? A. They keep some trash in there.

THE COURT: Some what?

THE WITNESS: Some trash.

BY MR. WAGMAN:

Q. Have they stored cars in there? A. No, they have not used it to store cars, they have no cars.

Q. To what other uses do they put the right of way? A. Mr. Catrell would walk back and forth to work, but actually I never saw him on what is really the right of way, he would come out of the garage and walk down on the part that is not included in the twelve feet, it is open. You see, the open part, the twelve-foot right of way lies to the north and the other is open, you can't tell where one starts and stops, it looks like one big thing.

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313 THE COURT: When you say they didn't walk on the right of way, are you saying they walked on the property of the people whose property faced North Carolina Avenue?

THE WITNESS: That is right, this is Mr. Catrell's. Now, a friend, who was a friend of my son's, he plays on the right of way all the time and in my own yard.

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315 THE COURT: Who was it you were speaking of?

THE WITNESS: Mr. Catrell, who is the tenant of the Mrs. Connor at 170 North Carolina Avenue.

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15 BY MR. WAGMAN:

Q. Now, directing your attention to the garage at 172, the rear,

have you had occasion to observe, since your occupancy of the premises 149 D Street, whether that garage has been used for parking up until the present time, from 1957? A. Yes, for a short period of, oh, maybe two weeks, I would say.

Q. When was this? A. That was probably in 1958 or maybe early 1959. It was used by a small sport car, I believe it was a foreign make and they, on one occasion, when they were backing out, they smashed the rear tail light of our car which was parked on our own property. And on another occasion, they also bumped into our car, but smashed the rear tail light of their own car, and after that they stopped using the garage and it was not used again until after the gates we put up were removed following the injunction and after they had removed both doors to the garage.

Q. Directing your attention to that garage, did there come a time when one of the gates came off before the gates were removed?

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A. Yes.

Q. When was that? A. This was during the winter of 1963. I was in the back part of my house, the children were playing on what constitutes the yellow strip, there were two or three of my own children and the Ribble children and Michael Phillips and maybe two or three others, these are all preschool age children, and as I watched, to my horror, I saw this door stopple off and it looked as if it were going to fall down and crush the children, it is a big door about two feet wide and maybe nine or ten feet high.

Q. What stopped the door? A. It fell across the gates we had there and hung teetering on the gates and I ran out and snatched the children away and I tried to do something to the door, but it was much too heavy, I couldn't, so I called, I can't know, I am not clear in my own mind on this, whether I called Al down at the liquor store and had him send somebody up or --- I believe I did, I believe he sent Howard Morrison up and Howard propped the door up against the garage so that it, you know, wouldn't fall back down. What caused it to fall, I don't know.

Q. Was that one of the doors that you know was removed completely from the garage after? A. That door was never put back up and then subsequently, when they found they couldn't get the car into the garage, because you have to make almost a right-angle turn in

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order to get into the six-foot opening that was left when one door fell down, then the tenant, I believe it was Donald Lukens at that time, he and a couple of other fellows came out and removed the other door from the garage and left the front open so that they could get the car in.

Q. Since that time, has there been parking in that garage? A. Yes, there has.

Q. And how many cars have you observed being parked there? A. At a time, one. Now, different cars have parked there, but the garage will only hold one car at a time.

Q. To what uses has Mrs. Grigsby put the right of way since 1957 and then on? A. I really cannot say. As far as I know, the only time, I suppose, that I know that Mrs. Grigsby ever used the right of way, she may have, was when she came in through my house, she had forgotten her key or gotten locked out or something, and Mrs. Grigsby, to my knowledge, never set any debris or trash or anything else out onto it. No problem whatsoever with Mrs. Grigsby.

Q. To your knowledge, have the tenants in 172 ever put any trash or debris out onto the right of way? A. Yes, they have.

III 318 Q. Do you know at what times that occurred? A. Well, it would be hard to say, because many, many, many times.

Q. Are you familiar with the paving of the right of way? A. Paving?

Q. Yes, or condition of the paving of the right of way? A. Well, the only thing that might conceivably be called paving are a few pieces of broken concrete which are in front of the garages. The upper part of Mrs. Schreiber's fence up to Mr. Gruis' property is unpaved, it is just dirt.

* * * *

III 319 Q. Did there come a time when the fence between the Gruis property and your property was taken down? A. Yes, it did.

Q. Do you know by whom it was taken down? A. By some of the workmen who were working for Mr. Gruis.

Q. Was notice of this removal given to you prior to the removal? A. No.

Q. Were you consulted in any way by anyone-- ? A. No.

Q. -- employed by or working for Mr. Gruis, or by Mr. Gruis?

A. By no one.

Q. Do you know how long that fence stayed down before it was replaced? A. Well, I think it was taken down, it was sometime in December of 1963, and the new fence was put up, I think it was in May of 1963; it was, the old fence, I am pretty sure it was December.

Q. What effect, if any, did removal of the fence have upon your yard, your rear yard? A. Well, it opened my rear yard to the apartment rear yard and to the four flights of stairs which at that point were in a very rickety condition and it also, Mr. Gruis removed some fence that apparently had stood between his property and the Horton's property, and she has sort of a walkway, I think she calls it a porch, it is covered with a top, which opens to Second Street, so my children and the other children in the neighborhood could go from my yard through the apartment yard through her yard and out to Second Street.

III 320 The twins at that time were just at the toddling stage and on several occasions, one of them would get up on the steps, while I was watching the other one, and I know at one time, one of the twins, then about sixteen months old, maybe seventeen, got up to the top of the fourth floor and Mr. Coleman, who lives down a way, came running out of his house and I was on my way, she was up at the fourth floor and at the railing which, as I said, was very rickety, that was before the house was remodeled. And Mr. Coleman and I simultaneously ran up and got the twin.

On other occasions, I got them myself, and the children sometimes, and the dog especially, would get out onto Second Street. There was no way, in the beginning, of keeping them in. So then we got a chain link fence and had it put in along the side of the house, there is a six-foot opening between Mrs. Prettyman's house and our house on one side and a similar narrow opening on the other side, and we had chain link put across there, making a temporary restraining place for the children until we were able to make other arrangements. I chased children practically throughout that entire period, believe me.

III 321 Q. When you purchased Lot 848 in 1951, to your knowledge, there was an easement by grant? A. In 1951?

Q. Yes. A. Yes, there was.

Q. On the deed you received? A. That is right.

Q. Was there a time that you had reason to believe that this easement by grant was in error? A. That is correct.

Q. When was that? A. That was after the initiation of this suit when I began to search title to the property.

Q. What caused you to believe that this grant was in error?

MR. WILKES: If Your Honor please, I object again to this question on the basis that the equity suit speaks for itself. Now, if she has any personal knowledge of the ~~circumstances~~ dating back to the date of the equity decree, in the equity proceedings dating back to 1919, I would certainly have no objection to that.

MR. WAGMAN: I will rephrase the question.

THE COURT: All right.

BY MR. WAGMAN:

Q. Did you search the title on Lot 848? A. Yes, I did.

Q. And how far back did you go when you search the title? A. Back to the beginning of the Civil War.

Q. Did you have occasion to go through the equity proceeding 34055? A. I did, I went through them, I went through them several times. I was trying to trace eight feet and I was reading and re-reading the equity suit.

I discovered that the right of way that had apparently been put on pursuant to a Court order in connection with the sale of Lot B, that this Court order had subsequently been rescinded, that the Court order itself had not provided for an easement appurtenant but only an easement in gross. That when the trustees had come in and asked for approval of the sale of Lot 18, which they did although they didn't own Lot 18, they didn't mention right of way nor did the Court order approving, and again approving the sale of Lot 18 which the trustees did not own, made no mention of the right of way.

Let me see, there was another factor in there. The trustees, it was a very confused suit because the same people were acting in different capacities, they were acting as trustees for the partition suit and they were also acting as trustees under the will for a property, I believe it was for William Allman and his children, at 174 North Carolina Avenue. And in their capacity as trustees under the will, they had not signed one of the papers and I think it was

the request for sale of Lot 18, although they did receive as trustees the share for the children.

And these factors led me to question the validity, at which point I sought the aid of counsel on it.

Q. Since your occupancy of the premises 149 D Street, S.E., have you been troubled by rats? A. Well, a friend of mine said I should write a book called "The Rat and I". The first time was when Providence Hospital was vacated and we were, the neighborhood, when I say we in this, I am referring to the neighborhood not to our own property, a wave of rats came over and wherever there is any trash accumulating, the rats will accumulate. Well, the right of way at that point was littered with trash a good part of the time.

The next time was when Carroll Street, and part of the buildings were on C Street and Pennsylvania Avenue, were demolished and at that point, the rat inundation became so terrific that several of the neighbors, we all put poison out.

We called the Health Department, we called everybody, and finally Dr. Ribble, my neighbor who is employed by the Public Health Department, through her official capacity and in a medical sense, finally got some help.

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324 I know Mr. Mustyan, who was here the other day, if I recall correctly, he came to my house in response to a call I had made to have somebody come up and try to do something about the rat situation. It was so bad, you could stand out in front at night and see rats running across the street, right across D Street.

Q. And you had occasion to call the District of Columbia and complain about the rat infestation? A. Oh, yes.

Q. Was it in response to that call that Mr. Mustyan came out? A. I believe it was. We, later on when the Folger apartment was vacated, there was another, not quite so terrific inundation of rats but again this was brought under fair control.

Q. I show you this photograph marked Defendants' Exhibit No. 3 for identification. What does it depict? A. This is the rear of Mrs. Schreiber's fence and I believe these are Mrs. Horton's trash cans.

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III 325 Q. I show you Defendants' Exhibit No. 27 for identification, a photograph, what does that depict? A. This is my four older children, this picture was taken in 1957, and the fence in the background is the fence that we built in 1957 -- the old fence that stood at its eastward end, approximately seven feet toward our property from the yellow line which marked the right of way.

Q. I show you Defendants' Exhibit No. 28 for identification. A. This is the temporary fence which we made out of the gates that were taken down after the injunction, it stands approximately on the northern end of the right of way.

III 326 Q. And No. 29 for identification. A. This is our yard and the area constituting the right of way after the issuance of the injunction and the removal of the gates by Mr. Gruis and before we had installed a temporary fence along the right of way line.

There is a white line here which indicates the string which the workmen had laid out for putting the fence up along the right of way line. You will note that there is quite a distance between this string and the telephone pole. Now, the previous fence at that point stood inside the telephone pole.

Q. By inside, you mean north? A. North -- let me think.

Q. Toward D Street, S.E.? A. Yes. When we built the fence, we didn't want the telephone pole -- we put the fence up to enclose a play area for the children and we didn't want the pole inside that yard for them to climb it, so we put the fence up to the north of the pole.

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III 327 Q. I will show you Defendants' Exhibit for identification No. 30. A. That shows part of the gate and the tree stump which Miss Schreiber had removed from her yard and which was on the right of way and which we subsequently moved off, away.

Q. And No. 31, Defendants' Exhibit for identification? A. This shows the gates which we erected in front of the garage and a pile of trash that I believe this pile was put out by the boys who live at 172.

Q. Defendants' Exhibit for identification No. 32? A. This is the new fence built by Mr. Gruis, Miss Schreiber's fence, and Mrs. Horton's trash cans.

Q. And No. 33, Defendants' Exhibit for identification? A. This is the rear of our yard looking toward the right of way with a truck parked on the right of way, following -- I think it was the day after or two days after the injunction was issued and the gates were removed. It was between the removal of the gates and the time we put up the temporary fence.

Q. And Defendants' Exhibit for identification No. 34? A. This is a picture looking from the right of way toward Mr. Gruis apartment, it shows that the fence to the apartment had been removed, this is dated December 1962, shows a pile of trash put out, I believe, by Mrs. Horton, which is against Miss Schreiber's fence on the right of way.

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Q. Mrs. Ishee, when you purchased the property in 1951, was there a fence or part of a fence running east and west across the property line along the north line of the alley, of the right of way? A. Yes, there was. There was a very old fence and there was a fairly wide opening in it, I don't know whether it had been a gate or part of it had fallen down, but the fence ran approximately east and west at that time.

Q. Did you have occasion to learn who erected that fence? A. In searching the title, I had occasion to go down and look into permits and I found --

MR. WILKES: Objection, if Your Honor please. If there is some reference to a permit with respect to the fence, the permit would be the evidence to that.

THE COURT: All right. Just a moment, would you read the question?

(The question was read by the reporter.)

THE COURT: Have you seen the permit?

THE WITNESS: Yes, I have. I have a copy of it.

MR. WAGMAN: May this be offered for identification?

THE CLERK: Defendants' No. 35 for identification.

(Copy of permit to build fence was marked Defendants' Exhibit No. 35 for identification.)

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MR. WILKES: If Your Honor please, I thought they were referring to a different fence. You are referring to what fence? You offer this to show a permit to construct what fence?

MR. WAGMAN: The fence that stood from 1924 until some time in the fifty's along the north line of the right of way, the fence which was constructed by Lee Walsky, put up by Lee Walsky at the time the garages were built.

MR. WILKES: If Your Honor please, I will have to object to it on the basis that it appears to be a permit issued November 29, 1963. I don't see how this could show a fence was erected under permit in 1924.

MR. WAGMAN: May it please the Court, this shows a duplicate of Permit No. 283 -- no, 2581, issued to Lee Walsky, a duplicate of Permit No. 2581.

MR. WILKES: Perhaps I didn't read far enough, Your Honor.

THE COURT: Well, it says in the first line, date, November 29, 1963. Then it says duplication of 2581, Permit No. B-108603, Lot 845, Square 734. Then it says address of work done, 149 D Street, S.E. But there is nothing here to show what the date was of this --

MR. WILKES: Your Honor please, if he is offering this to show a permit authorizing the construction of a fence north of the twelve-foot right of way, I have no objection.

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MR. WAGMAN: I am offering it in substantiation of the testimony given by the plaintiffs Mrs. Grigsby and Mrs. Connor that the fence that stood on the south line of the right of way was torn down when the garages were built and that a fence was then built on the north line of the right of way, and that is all.

THE COURT: This says, in the middle of this, "Construct wood fence, eight feet high, on alley line."

MR. WAGMAN: On alley line.

MR. WILKES: Your Honor please, if what he is referring to as the alley is the area colored in yellow, I would have no objection.

THE COURT: What do you claim this purports to cover, Mr. Wagman?

MR. WAGMAN: All it shows, Your Honor, is that when the garages -- to substantiate the testimony given by --

THE COURT: Well, I don't want to go back to that. I am trying to find out now what you are speaking of, what do you claim

this relates to, what part?

MR. WAGMAN: That Lee Walsky put up an eight-foot fence on the north line of the property sometime during the time that he owned the property, and that is all.

THE COURT: You say the north line of the property?

MR. WAGMAN: The north line of the right of way, I am sorry, Your Honor.

III 331 MR. WILKES: That he got a permit to erect one at the north line; I have no objection.

BY MR. WAGMAN:

Q. Can you identify this paper? A. This is a duplicate of permit 2581, which Lee Walsky obtained, I believe it was September 17, 1925, to construct a wood fence eight feet high on the alley line.

Q. Did you, in your search, find any other permits by Lee Walsky to construct any fences between 1925 and 1945? A. No, I did not.

* * * *

CROSS-EXAMINATION

BY MR. WILKES:

Q. You have introduced into evidence a permit of Mr. Walsky that you say, although the permit does not show, was back in 1925, as best you recollect from the records? A. As best I recollect.

III 332 Q. And then when you moved there -- pardon me, strike that. When you purchased the property in 1951, you found part of the fence there but that fence that you found there when you moved there, was substantially to the north? A. No, that is not right.

Q. Then you disagree with your husband who says that it was at one part over toward the east at least ten feet north of the right of way line, you don't agree with him there, is that correct? A. I think I listened to the testimony and I think either he was confused as to your questions -- now, the fence, if you will look at this chart here, this chart I drew to try to explain a very confusing situation. This represents the northern line of the right of way, the yellow area on this chart. The fence which Lee Walsky, I have reason to believe is the same as the one that Lee Walsky built and which was partially in place when we bought the property, ran roughly along this line. Now, this fence was removed.

My husband and I are in disagreement as to the exact time at which it was removed. I know it was removed prior to the time that we moved into the property because I used to come down and collect the rent sometimes and there was no fence here at the back, it was all open.

Now, the fence which stood, I measured it just to make sure, it stood inside the telephone pole, here's the telephone pole which is shown in the picture.

III
333 The fence we built in 1957 was inside, to the north of the telephone pole. The telephone pole stands about seven feet in from the northern line of the right of way.

Now, this fence ran diagonally southwest to northeast. This had nothing whatsoever to do with the right of way. It was merely a fence we had built to enclose a play yard for the children. It did not run across the property, it ran for -- it is hard to say, maybe eighteen feet. This part of the property was open.

This along here, we had chicken wire, the children played in here for awhile. But this is not exactly to scale, actually the fence should have been down here, because I am not a very good cartographer.

Q. Why do you say for awhile, was it knocked down from time to time, is that it, the chicken wire you are talking about? A. No, it had an opening in it. Chicken wire eventually - it is only a temporary measure. No, this fence, part of it was knocked down, a small part of this fence was knocked down; who did it, when, I don't know, we came out one morning and found a part of it down.

The rest of the fence was used, some of the boards and some of the two-by-fours were used in part to put up these gates.

Q. The gates that were the subject of the restraining order?

III
334 A. That is correct.

Q. I see. Now, you have one photograph that has a line drawn somewhere there? A. That is right.

Q. What does that line purport to show? I am confused. A. That line purports to show the northern end of the right of way where the fence, the gates which were taken down from here were put up here. As you will note on that photograph, the telephone pole stands quite a distance from the north of that line. The line on the picture and

the dotted line here are the same.

Q. The cement that is just worn to a point where it is broken into pieces, is part of this right of way area, are some of those still in evidence north of the twelve-foot right of way area? A. No, there are none and to my knowledge, there were none, I never saw any.

Q. I will direct your attention to your Exhibit No. 29 which you have just offered in evidence and I will ask you if that is a part of the cement that you see in the photograph? A. That is correct, yes.

Q. Is any part of it north of the line --

THE COURT: Just a minute. I think it would be better for the witness to go back on the stand.

* * * *

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BY MR. WILKES:

Q. Is any part of it north of the line? A. No, it is not. That is not all cement, that is some bare spots.

THE COURT: What is this line there?

THE WITNESS: That is the line which represents the northern line of the right of way, it is the string that the workmen put up to insure they had the temporary fence we were building, after the injunction, on the right line, so that we would not be over our right of way. And the other fence, the one that was built in 1957, stood to the north of the telephone pole.

BY MR. WILKES:

Q. Now, Mrs. Ishee, referring to your deposition and commencing on page 54, I questioned you and you answered as follows:

"Q. How long have you had the station wagon? A. Three or four years.

"Q. Did Mr. Ishee ever bring any other car home? A. We used to have a Hudson before we had the station wagon.

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"Q. Has he ever brought any other car home while you owned the station wagon? A. Well, I'm sure on some occasions he has, I'm sure. I don't remember. There was on one occasion a yellow car.

"Q. What kind of car was that? A. I don't remember the make of it, it was a little foreign car.

"Q. Was that ever parked in the right-of-way? A. I don't remember it being parked there.

"Q. What was the occasion for Mr. Ishee having the car there? A. I don't know.

"Q. Was he driving it? A. I believe so.

"Q. Did Mr. Ishee ever bring any other car home? A. Not that I know of. He may, I can't say that on occasion he didn't drive a friend's car home and parked it there for an hour or so. But I don't remember any particular occasion.

"Q. Any car he did bring home would have been a friend's car? A. Well, I would assume so.

"Q. What is Mr. Ishee's business? A. Mr. Ishee he with the Department of Labor.

"Q. Has he ever had any part-time jobs? A. Real estate salesman.

"Q. How long? A. Oh, he's been a real estate salesman for quite a long time. I don't know how long, but many years.

"Q. Has he ever had any other jobs part-time? A. No, not to my knowledge.

"Q. Has he ever had any work that involved in any respects automobiles? A. I don't think so.

"Q. If he did, you would know it, would you not? A. I would assume so. As a matter of fact, he doesn't know very much about automobiles. He's no repair-man."

Q. Now, in response to those questions -- strike that. Do you have any different answer to those questions today? A. No, I do not.

Q. You still don't know to this day that Mr. Ishee -- strike that. Deposition of Mr. Ishee:

"Q. Any time during the time you have lived there. A. Well, now, during the time I've lived there I've had other cars but I haven't parked in this yellow strip here.

"Q. Whose cars were they? A. Mine. I had a green Hudson at one time. I had a '49 National pickup truck at one time. I had at one time on hand a little MG. And I forgot the make of the other little black car. But these would have been parked well up to my house here.

"Q. There were in addition to other cars -- A. These

were ones that I didn't own personally.

"Q. What was the occasion of your having them? A. I was with an organization that was doing some financing of those cars. We took a couple of these cars back in and I put them in back of my house until I could get a garage to get them.

"Q. You repossessed them? A. Yes.

"Q. How many did you have repossessed? A. The only time I had were two. I don't see -- you want to know the ones that were repossessed?

"Q. How long did you work there? A. I didn't work there. I was part owner. These two cars were there for a very short time."

MR. WAGMAN: I don't see anything wrong with this --

MR. WILKES: This is cross-examination, if Your Honor please.

MR. WAGMAN: There is still no relevancy. There is no indication these cars were parked on the right of way or that they were there at any particular time.

THE COURT: Well, that is what he is asking her about.

MR. WILKES:

Q. This is continuing on page 92:

"Q. How long did you work there? A. I didn't work there. I was part owner. These two cars were there for a very short time. I don't know what this has to do with this. They were always parked well inside of the area.

"Q. What was the name of the business? A. It was Potomac Investors Trust.

"Q. And how many cars did you repossess during the time of your business?

"THE WITNESS: Is this pertinent?

"MR. WAGMAN: Answer his question.

"THE WITNESS: Gee, I don't know.

"BY MR. WILKES:

"Q. Two, 50, 100? A. I'd say a half a dozen. Actually I don't know, I don't remember.

"Q. What was the make of car that you repossessed here? A. One was an MG and the other was an English make, a black Hillman. The other was an MG."

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Q. Is that the same MG that you referred to as being owned by a friend of Mr. Ishee? A. I believe it was.

III 340 Q. You mean he repossessed a friend's car? A. All I know about this is you, I believe in the deposition, you asked me if my husband worked at any place connected with cars and I replied that he did not. He did not, does not, and never has.

All I know, they, a group of people, mostly government employees, have some sort of an investment group, I am not a part of this group, I know very little about its operation. They invest, they all put in some money and invest in, oh, a whole variety of things. I have no knowledge as to the total investments they make or what these investments concern.

About this car, one day, I believe it was the fellow from Capitol Service Station, Capitol View Service, brought it up and said Mr. Ishee wanted the car up there, for some reason. There was no parking place in the front and because it was a little car and there was room to get it in the yard, I told him to bring it around the back, which he did. And I believe it was there, parked in our rear yard, for several days, during which time I called Capitol View and tried to find out if I was going to be left with this car. And, ultimately, it was removed.

Q. Now, directing your attention to page 62, I was questioning you:

"Q. Did you also plant shrubs in the right of way area; shrubs, trees, bushes or anything of that nature? A. Never. No."

III 341 Do you wish to change that testimony today? A. No, I do not. I may explain it. You asked me if I had planted shrubs, trees, bushes on the right of way. At the time I said no. On trying to think, I did plant rose bushes and forsythia bushes to the north of the right of way, and then I remembered that on the south side of the right of way, I had taken two forsythia cuttings and put them in the ground. Now, one of these apparently took root, they were at that time two cuttings, I was trimming the bush and just put them in the ground. One of these took root and so to that extent I amend my statement. The other one died.

Q. How many are there today? A. I have no idea.

Q. In the area of the right of way, just north of Schreiber?

A. I can, from my house, I can see several tall spindly things growing. I assume they are tree seedlings which are also growing all over my yard, I have to pull them out regularly. The tree which was cut down sent jillions of seeds all over the place and I am sure that any one of the surrounding neighbors can testify we have both mimosa trees and elm trees and others growing all over the yard, we just keep pulling these little seedlings up. Now, it may be, but I did not plant a tree or a bush, I planted in the ground two cuttings, one of which took root and the other died. What the other things are against the fence, I don't know. I did not put them there.

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Q. Now, reading on with your questions:

"Q. Never planted anything of that nature?" Referring back to my question, shrubs, trees, bushes or anything of that nature.

"A. Not on the right of way. I planted on the side of the right of way but not on the right of way.

"Q. Where do you refer to it as not on the right of way?

A. The north side.

"Q. Has Mr. Ishee or anybody employed by you planted any shrubs or trees or anything of that nature? A. I'm the only one that has done any planting and I did not plant any there because I measured it."

Now, these that you did put in are substantially south of the north line of this yellow area, are they not? A. Well, I guess technically if you take a cutting and stick it in the ground, it is planting. It was not rooted at the time it was put in the ground. I will say my intention was to try to get something to grow where there had been nothing but trash and debris. This is correct, that was my intention, one of the cuttings did root, the other apparently died.

Q. The fence which Mr. Gruis removed, would it be fair to describe it as a fence in dilapidated condition? A. I would say it was an old fence, yes.

III
343 Q. Referring to page 37 of the deposition, I am questioning you:

"Q. Do you have a dog? A. Yes, I have.

"Q. What kind of a dog is it? A. Boxer.

"Q. How large? A. Regulation Boxer size.

"Q. Does he ever knock over the cans? A. Yes, he does. He's a ratter; goes out after rats, which is why I have him.

"Q. Was he contained within the area of your back yard before the fence along the green line was removed? A. Yes, pretty well.

"Q. After the new fence went up with the gate, that is the cedar screen fence, was he contained within your yard then? A. Pretty well except when the gate was open, which was pretty often."

Is that substantially what your testimony would be today? A. And I understand, after the deposition, my husband and I differ on this. I said she was a ratter, by which I meant she will kill rats and she will attack rats, and my husband said he thought she was afraid of rats, so there will be a discrepancy there. But I know that on one occasion when this inundation of rats came over us, I had the children, the two little ones, out on my side yard and I also had Wendy out there with them and she began frantic barking, so I went out the side door and she had two rats cornered in the corner of the fence and she was down and the babies were on this side and Wendy had the two rats. Well, I snatched the babies in the house and ran out front to see if I could find a man passing by who could kill a rat or do something, and by the time I did find somebody, we went back out, Wendy and the rats, the rats had, I don't know, gone, gotten under the fence or what, I don't know. That is why I said what I said and I have seen her on other occasions attack rats.

Q. Now, you have many photographs and much testimony in this case with respect to the sloppy condition of trash of certain of the plaintiffs herein. Can you distinguish between that which is put out in a sloppy condition by the parties plaintiff to this suit and that which your dog may have mussed up in connection with his ratting? A. Well, I will not say that my dog has not been guilty at times of knocking over trash cans. I will say that practically every other dog in the neighborhood is guilty of the same thing. If a trash can is put out in a metal container covered with a tight lid, a dog cannot scatter - or cat or rat - can't scatter the contents anywhere.

III
345 Now, referring to page 42 of your deposition, I am questioning
you:

"Q. The link fence, which I'll refer to as a cedar fence, is in back of the Gruis property? A. Yes.

"Q. Where is that in relation to the one that was taken down? A. Stands about a foot to the east of where the old fence stood.

"Q. How do you know that? A. Because the morning the carpenter was putting up the fence, which was the day after we had had the survey, the carpenter was talking to Mrs. Prettyman and he had stretched the string, he was trying to get the location from her house and he was stretching a string, and I went out in the back and showed him where the surveying had located the line.

"I said there was no sense in putting up a new fence that had to be moved back anyway. We hadn't been involved in litigation and it actually wouldn't have been that much difference, a few inches of line. And since we were involved in litigation there was no sense in putting up a fence and relocating it again.

"So he had to put a line in where the markers were and put his fence up - I don't know - a foot east of where the other one stood."

III
346 That is as it happened, is that correct? A. I believe so, that morning Mrs. Prettyman was out there, she and Mr. Gruis had been having some altercation, he had put a fence over on her land or there was some altercation about that and she was out talking to the carpenter.

"Well, I was at this point very tired of all this neighborhood difficulty that we had gotten into. I saw the carpenter stretching a line. Now, whether it was approximately on the line of the other fence, I think it was approximately, it may have varied an inch or so, I don't know.

Q. When you say on the line of the other fence, you mean the fence that Mr. Gruis took down? A. That Mr. Gruis had removed. Well, I knew that the fence Mr. Gruis had removed was on our land, we had known it for a long time; the survey we had made had proved beyond a shadow of a doubt that our property line was at least a foot east from where the old fence had stood and the thinking of my

husband and myself was that Mr. Gruis, even though we are involved in litigation with him, if he is going to put up a new fence, there is no point in having to put up a new fence on the wrong line, that might have to be taken down again.

Q. Now, you say you checked the records and you found this fence of Mr. Walsky in the records that was along this line and you checked it down to date. Did you ever find a permit from Walsky or anybody on your lot with respect to putting up a fence at the rear of Gruis' property? A. No, sir, I found no permit in the name of anybody for putting up a fence there.

Q. Did you ask Mr. Gruis whether it was all right to tell his contractor to put the fence a foot to the east? A. No, sir, I did not.

Q. Would you say -- strike that. A. Mr. Gruis and Mrs. Prettyman had had a great, big altercation the previous day on her fence line and --

Q. There is no question pending, Mrs. Ishee. A. Well, I just didn't want to cause anymore trouble. I wanted to settle the thing, if it could be settled.

Q. I see. Then, are you complaining because Mr. Gruis moved the fence a foot to the east? A. No, sir. No, sir, I am not complaining.

Q. Then, you are not complaining about where the fence is today? A. Sir, you misunderstand me. I said I did not want Mr. Gruis to have to go to the trouble of putting up a new fence which might subsequently have to come down. We were then involved in this law suit, I had no idea, he was suing for \$25,000, I had no idea how the thing would develop. I wanted to be as peaceable as possible.

Q. Now, answer my question: Then, you have no complaint about where the fence is today, the new cedar spring fence? A. Yes, I have, it is still on our land. It is a party fence into which he cut a gate, without our permission and contrary to the District Code and he had obtained no permit for it at the time he put up the fence. Mrs. Prettyman and I both complained to the District, they sent inspectors up, the District sent Mr. Gruis a notice, I saw a copy of the letter, and he subsequently obtained a permit for the fence. So the fence is still a party fence into which a gate was put without any

consultation and no permission on our part.

Q. Now, the gate that was placed in there by Mr. Gruis, that is substantially at the place where the gate was when you moved there in 1951, when you purchased, pardon me, in 1951? A. It is a much larger gate. It was a fairly small gate. Mr. Gruis also has a gate leading into Mrs. Prettyman's fence, she is also complaining he got no permission for that.

* * * *

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Q. Now, Mrs. Ishee, you stated that Mr. Ishee first suggested that the neighbors get together and buy it. He suggested this, you say, before Mr. Gruis, is that right? A. That is right.

Q. But he didn't do it, did he? A. Yes, he did. We had meetings at Mrs. Prettyman's house. Mr. Krizek, who is one of the present partners of Mr. Gruis, attended that meeting.

Q. Well, you were happy when Mr. Gruis came along and bought it for the purpose of renovation, were you not? A. Of course.

Q. Now, since he has purchased it and renovated it and moved in the new tenants, after the building has been renovated, to what extent have the tenants utilized the right of way area? A. The question is, since the new tenants have moved in?

Q. Since he completed his renovation? A. I have had trucks parked constantly on the right of way, I had a fifty-foot moving van parked there all day while Lee Lawrence's furniture was being moved in. I have had repair trucks, plumbing trucks, I have a long list, I took license numbers, and so forth, for about six weeks and then I gave up because it was every day.

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Q. Now, Mrs. Ishee, answer my question? Since Mr. Gruis has completed the renovation and moved in new tenants, to what extent have the tenants walked down the right of way area in yellow down the public alley to the liquor store, and so forth, to what extent?

A. On occasion.

Q. On occasion? A. That is right.

Q. Has it been frequent? A. No, I would not say it has been frequent.

Q. Has it been infrequent? A. The tenants walking down has been infrequent, yes.

Q. So how would you compare the use of the right of way, since

Mr. Gruis purchased the property and completed the renovation and the moving in of the tenants in the renovated building, with the use previous thereto, insofar as tenants of the Folger apartments walking out through the gate, across the right of way area and down the public alley, and in? How would you compare them? A. I would say prior --

Q. Would you please give me an adjective? Is the use, most recent, since the completion of that renovation, heavier, much heavier, the same -- A. The vehicular use is heavier.

Q. -- less or very much less. A. I would have --

III 351 Q. I am talking about the pedestrian ingress and egress. Now, answer my question, please. A. The pedestrian ingress is less. The vehicular use is greater.

Q. Now, you have heard the testimony in this case, for several days, about tenants parking back in this area, in the right of way, in your back yard -- A. Yes.

Q. -- over a period of many, many years. A. Yes.

Q. Do you have the same parking problem now from tenants in the Gruis apartment that you had before, or is it less? A. In order to answer that truthfully, I will have to divide it into two periods. Prior to about 1958--

Q. Just a moment, please. Will you please answer my question?

THE COURT: Read the question to the witness, please.

(The question was read by the reporter as follows:

"Do you have the same parking problem now from tenants in the Gruis apartment that you had before, or is it less?")

THE WITNESS: The same use before or when, two weeks before, a month before?

BY MR. WILKES:

Q. Before the apartment was remodeled, I am talking about parking in that area by tenants of the Folger apartments, is it more now or is it less now, or is it the same now? A. Well, you see, I am trying to -- during Mr. Gruis' ownership or the prior ownership, what do you mean by before? Before can date back to the year 1.

III 352 THE COURT: You did say before and you didn't say before what, so you should clarify that for her.

MR. WILKES: Yes, Your Honor, I agree my question was not as clear as it should have been. I withdraw the question and I will rephrase it.

BY MR. WILKES:

Q. Has the use of the area in yellow, on Plaintiffs' Exhibit No. 1, for parking by tenants of the Folger apartments been greater than before you erected the barricade in August of 1962? A. May I repeat the question as I understand it? Has the use been greater since the barricade or gates were removed?

Q. Was removed, than it was before the gates went up by you? A. No. No, I wouldn't say that.

Q. Has it been the same or less? A. I think it is somewhat less.

* * * *

Q. Mrs. Ishee, you stated on direct examination that after this suit was filed by the plaintiffs, you discovered something in III 353 an equity suit? A. That is right.

Q. And you examined that file? A. Yes, sir.

Q. Now, that was over eight months after you had put the fence up, isn't that right? A. That is right.

Q. So that you had nothing whatsoever to lead you to any belief that there was any defect in the deed for the benefit of the right of way creation, for the benefit of the North Carolina Avenue houses, outlined in blue on Plaintiffs' Exhibit No. 1, at the time you put the fences up? A. No, sir, I did not. I had looked into it a little bit and had run into several cases where a servient tenement-- and at that time we believed we were the servient tenement -- had a right to erect gates at the point where a right of way met his property. I have forgotten the citations of these cases but there were several of them, and other cases where the use by the dominant tenements was unreasonable, the servient tenement had a right, so to speak, to protect himself.

Q. I have not asked you for any research which you have done, and you have answered my question. In connection with the equity suit and in your review of the file, did you read the appraiser's report that states, in pertinent part, as follows:

III 354 In connection with the D Street property, we recommend

that a ten-foot strip be taken off the rear of this lot to be used for alley purposes for both the D Street and North Carolina Avenue property. If this should be done, charge the North Carolina Avenue houses with \$25 each additional. This would give a direct outlet to the public alley to all of these houses and, to our mind, would be very beneficial for a future market.

Did you read that part? A. Yes, sir, I did, I read it and studied it very carefully.

* * *

Q. Subsequent to the appraiser's report, did you consider the trustees' report to the Court? A. There were several trustees' reports.

Q. Just a moment, I haven't finished my question-- which report contained the following pertinent language:

That there is one condition annexed to said sale which your trustees also recommend as reasonable, namely, that a perpetual right of way, for the benefit of Lot 2 and said Lot B over the rear twelve feet of Lot 18 of said square, also involved in this cause and held by your trustees for sale, be allowed.

A. Yes, sir, I did.

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Q. Did you additionally observe, on the agreement attached to the real estate appraiser's report, the consent of all beneficiaries involved with respect to this proceeding? A. Well, now, just a moment, sir. The consent of all beneficiaries to what, to the division of the property?

Q. I will refer first to an agreement made November 20, 1915, which is just before that appraiser's report. A. As I remember, this agree--

Q. Just a moment, please. I did not ask you what the agreement provided, I said did you notice the consent of the beneficiaries? A. Yes, sir, I did.

Q. Did you consider the trustees' report of January 23, 1919, with respect to the sale of Lot B? A. Yes, sir, I did.

Q. Did you observe the consents of the beneficiaries thereto? A. I would have to see the report at this point. I have not looked

at it for some time and I do not remember exactly what it was.

III
356 Q. I am referring to the report to the Court by the trustees with respect to the sale of Lot B and the consent of the beneficiaries at the bottom of page 2. A. Well, now, this, as I remember, this is Daniel Allman, Margaret Connor, Hanna Reed, Daniel Allman, trustee, and Margaret Connor, trustee. Now this does not say whether Daniel Allman and Margaret Connor, trustees, were trustees appointed by the Court or trustees under the will. In most of the other papers, they signed in both cases; in this they have signed only as trustees. They were trustees in two capacities.

Q. It is my understanding, then, you observed the consents by these parties? A. According to this, all of the beneficiaries did not consent. They have not signed specifically in both capacities. I believe that report also refers to --

Q. There is no question pending, if the witness please. A. All right.

* * * *

REDIRECT EXAMINATION

III
357 BY MR. WAGMAN:

Q. Directing your attention to the roadway since the renovation, has the vehicular traffic in the roadway been greater since the renovation or was it greater before the renovation and between the time that you moved in, in 1957?

MR. WILKES: Object to that, if Your Honor please, on the basis that it is completely redundant, that that specific question was asked and she was given a full opportunity to answer it.

MR. WAGMAN: This question was not asked, Your Honor, on direct examination. This is in direct response to the question asked by plaintiffs' counsel when he asked about the pedestrian traffic coming from the apartment.

THE COURT: No, he asked her about the other, too, I thought, it is my distinct recollection.

MR. WILKES: I will withdraw the objection, if Your Honor desires me to do so.

THE COURT: All right.

THE WITNESS: Would you repeat the question?

BY MR. WAGMAN:

Q. Has the vehicular traffic been lesser or greater since the renovation than it was prior to the renovation and the time -- between that time and the period you moved into the property?

MR. WILKES: I will object to that, unless the vehicular traffic is restricted to that serving the properties of the plaintiffs in this case.

BY MR. WAGMAN:

Q. Vehicular traffic to and from the apartment building. A. It has been greater.

Q. And what has been the nature of that vehicular traffic, as you have observed it? A. Trucks, moving vans, and automobiles.

Q. Have any of those vehicles parked in the right of way, to your knowledge? A. Yes, they have.

Q. And do you know for what length of time any of them have parked in the right of way? A. Some have been parked all day, some of them park there part of the day and all night, some of them are parked there for short periods, an hour or two hours, it varies.

Q. Directing your attention to Equity 33045, when you examined the jacket, did you notice any sale for Lot B? A. Yes, sir, I did. Do you want me to go ahead? A request was made to sell Lot B, a request by the trustees to this Court, I believe it was dated September 17, 1918.

They asked that it be sold to a William Richardson and that a condition of the sale was the placing of a right of way over Lot 18, which they didn't own, for the benefit of Lot 2, only part of which they owned, and Lot B.

The Court approved the sale of Lot B to William Richardson and in its order approving the sale, also approved a right of way over Lot 18, and as I remember the language, it was in favor of the owners of Lots 2 and B.

It may not be pertinent, but at that time, I think the Court said in favor of the owner of Lots 2 and B. Well, Lot 2 had been subdivided into three lots in 1915 and Mrs. Grigsby's Lot 800 had been taken out many years before. So, Lot 2 no longer existed as such.

This Court order approving the sale of Lot B to William Richardson was approved in September 1918, I have forgotten the date.

Nothing further was done on it, the place wasn't sold to Richardson.

On January 9, 7 or 9, I don't know, 1919, the trustees again went into court, and asked for approval of the sale of Lot 18 to Marie Duff, again they didn't own Lot 18, they only owned part of it, they didn't mention anything about a right of way. The Court order approving the sale of Lot 18 to Marie Duff mentioned nothing about the right of way.

In the deed which the Court trustees issued to Marie Duff, by virtue of the partition decree which, as I remember, had granted them authority to sell under the supervision and direction of the Court, and by virtue of the Court order of January 9, they issued a deed to Marie Duff with a right of way for the benefit of Lots 2 and B. This was exactly the language which the Court had failed to approve; the Court had said, not for the benefit of Lots 2 and B, it said if they were the owners of Lots 2 and B. And this was one of the points, along with the fact that it called for a right of way over Lot 18, and at that point, at that time, a part of Lot 18 was owned by other people and part of it by the District of Columbia so at this point I questioned the validity and turned it over to counsel.

Q. Did you subsequently learn that Lot 849 had been a part of Lot 845, which was then broken up and became Lot 848 and 849? A. Yes.

Q. And you have since purchased Lot 849, have you not? A. Yes.

Q. By tax deed? A. Yes.

Q. When did you begin negotiations for that purchase? A. I think it was during the winter -- first, I guess my first contact with the Tax Office was actually in the early winter of 19 -- the early winter of 1962, I guess, when I was trying to find out what happened to eight feet. It was a very complicated thing and I think that was about the first contact I made and I talked to them several times by telephone and went down and then finally ended up in the vaults down in the Recorder's office.

Q. You finally ended up purchasing the property? A. Yes, sir.

Q. When was that done? A. The property was not actually deeded to us until sometime in July, I have forgotten the date.

Q. Of this year? A. Of this year.

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MAURINE T. HORTON

called as a witness in rebuttal for the plaintiffs, having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WILKES:

* * * *

Q. During the period of time that you have resided at 176 North Carolina Avenue, have you done anything with respect to cleaning up the right of way area which is colored in yellow? A. Yes.

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Q. What have you done and how frequently? A. Every Sunday morning, I would go out and rake and put the trash that was loose in my trash cans.

* * * *

CROSS EXAMINATION

BY MR. WAGMAN:

Q. When did you start this raking every Sunday morning? A. I did it for years.

Q. Isn't it a fact that it has been much more frequent since the beginning of this action? A. It certainly hasn't, it has been less.

Q. What part of the right of way did you rake and clean up? A. Down to Mrs. Grigsby's and picked up all the trash and I have even gone in Ishee's yard and picked up trash.

Q. How often do you do this? A. Every Sunday morning, I used to pick up trash around noon.

Q. Rain or shine? A. I got my trash out, rain or shine, and picked up the loose trash.

Q. Who has ever seen you do this? A. I know Mrs. Ishee has seen me rake, and the people in the apartment.

Q. For how many years have you been doing this? A. Years, not one year, not two, but years.

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Q. How many years? A. Since I have had the property.

Q. How long has that been? A. Since 1945.

Q. Since 1945? A. I have raked and cleaned the back.

Q. Every Sunday at noon, have you been out there raking the leaves, is that correct? A. And picking up trash.

Q. Picking up trash. A. Loose.

Q. Did you ever see a stump to the rear, in the right of way?

A. Sure.

MR. WILKES: I object to this, Your Honor please, on the basis, number one, it is beyond the scope of the direct; basis number two, that Mrs. Schreiber has testified that she put a stump in the right of way. There is no question in the world about that.

MR. WAGMAN: May it please the Court, Mrs. Horton testified she was raking, cleaning, and she cleaned the right of way every Sunday for a period of something like seventeen years.

THE COURT: She hasn't testified, however, that she took any stump of a tree.

III 366 MR. WAGMAN: I am asking her if she ever cleaned a stump of a tree out of the right of way.

THE COURT: I will sustain the objection.

* * * *

ANN SCHREIBER

called as a witness in rebuttal for the plaintiffs, having been previously duly sworn was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WILKES:

Q. You have previously been sworn as a witness in this case?

A. Yes.

Q. I advise you that you are still under oath. During the period of time that you have resided at 174 North Carolina Avenue, have you ever had occasion to do any cleaning of the right of way area in yellow on Plaintiffs' Exhibit No. 1? A. I state under oath that I have cleaned that alley every two weeks, definitely; if it needed it, every week. As I went to and from work, I picked up pieces of trash and just threw them in the can intermittently, without question.

Q. Now, you don't know, as of this very second, that I took a photograph of your rear yard this morning, do you? A. No, I don't.

Q. Do you recognize this as your rear yard? A. Yes.

* * * *

Q. Mrs. Ishee has very carefully testified with respect to cleaning up certain material and setting it over here at the south side of the right of way and very carefully testified with respect to trying to open up the gate to one of the yards and that gate was

III 368 closed, so that she picked up a bag and carefully reached up and dropped it down into a rear yard --

MR. WAGMAN: Objection, this is not the testimony that Mrs. Ishee gave. The testimony, as I recall it, Your Honor, was to the effect that there had been debris put out in the yard, that Mrs. Ishee had picked up the debris and put it in cardboard cartons and paper bags, that she returned at a later time and found the debris scattered over the yard again, with additional paper bags, she then put it back and put it over the fence into Horton's yard and some of it fell into Miss Schreiber's yard, that is the testimony as I recall it.

THE WITNESS: I think she did say that.

THE COURT: Just a moment.

MR. WILKES: I will withdraw my question and reframe it.

BY MR. WILKES:

Q. Mrs. Ishee has testified with respect to reaching over a fence and letting go of some bags containing trash. Did you observe, personally, any portion of this act? A. Yes. I was sitting with a friend, eating in my kitchen, my face faced the door, the door was open, I was looking out into the yard as I was talking to him. I observed this trash being thrown and I mean literally thrown and it was strewn as it hit Mrs. Horton's yard and mine, and it hit several feet in my yard and it was strewn as it hit from being thrown.

* * * *

CROSS-EXAMINATION

III 369 BY MR. WAGMAN:

Q. Miss Schreiber, did you see who threw that trash? A. I certainly did. Then we ran out and went around the fence and she was standing there, livid with rage.

Q. Did you see her throw it? A. Well, no, she was under the fence, but as she came around, then she made some comment about she had told Mrs. Horton many times to keep her trash in barrels and that this was the end.

Q. To your knowledge -- A. She admitted she had thrown it.

Q. To your knowledge, had the right of way been cleaned by Mrs. Ishee, had Mrs. Ishee had it cleaned the day before? A. She had some men in once, to my knowledge, when they moved the tree trunk

over to the end.

Q. Was that the day before this incident, do you recall? A. No, it was not.

Q. You said you cleaned up this? A. I certainly have.

Q. How often do you clean it up? A. I said in my testimony just now that it was about every two weeks and if it needed it sooner, I would do it every week.

III 370 Q. What portion of the right of way did you clean? A. From the apartment building past the Connors, almost up to the end of the Ishee property.

Q. And when do you perform this task? A. Sunday is my only day off.

Q. What time on Sunday do you do it? A. Approximately Sunday afternoon.

Q. What time Sunday afternoon? A. I do not set a time.

Q. Well, is it early afternoon or late afternoon? A. It is probably after noontime.

Q. So it is in the late afternoon? A. It is between noon and about four or five o'clock.

Q. Four or five o'clock, then you follow Mrs. Horton out there, is that true? A. Mrs. Horton has not cleaned that alley as much since I have moved there. We have made an agreement, she had cleaned it many years before I moved there and I said, well, I will take over and I certainly have.

Q. You heard her testify she cleaned it every Sunday, did you not? A. Well, she has been with me on occasion, but I have not been with her every Sunday, no. As I say, I do not go out there every noon.

* * * *

III 371

EDWARD G. GRUIS

called as a witness in rebuttal for the plaintiffs, having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WILKES:

Q. You previously have been sworn in this case and you are still under oath. Reference has been made to rickety back porches, at the time of removal of the fence at the rear of your property.

Were those porches rickety or in a dangerous condition? A. No, sir.

Q. You subsequently renovated the building and spent some 70-some thousand dollars doing it? A. Yes, sir.

III 372 Q. Was it necessary to replace those back porches? A. No, sir.

Q. What was done to them? A. There were a few floor boards replaced on one of the back porches and some spindles along the -- the inside spindles that ran down from the top railing down below, I think two or three of those were replaced and painted and then later inspected for the occupancy permit.

Q. Mr. Gruis, you don't know, as of this very moment, that I took a photograph of the rear portion of your property, do you, this morning? A. No, sir, not so far as I know.

Q. Have you either done or ordered any special act or anything different from what you have been doing before this case, in connection with getting ready for me to take a photograph of your property? A. I have not been there since this proceeding started.

* * * *

Q. I will show you what has been marked as Plaintiffs' Exhibit No. 49 and ask you if you recognize that to be-- A. That is my back yard, identified by the fence and drain and our type of trash receptacles.

III 373 Q. They are your trash receptacles? A. Yes, sir.

Q. With respect to the new fence you constructed, does this show the relationship of the new fence and the concrete that the new fence is brought up against? A. Yes, sir.

* * * *

Q. Mr. Gruis, did you know I took photographs also of the Ishee property this morning? A. No, sir, I didn't.

Q. I show you what has been marked as Exhibits 50 and 51 and ask you if you would recognize those as being somewhere within the Ishee yard. A. Yes, sir. This is --

Q. I just asked you if you can recognize them. A. This is part of the Ishee yard.

III 374 Q. Directing your attention to No. 51, do you see a number on the trash can? A. Yes, sir, it says 149.

* * * *

THE CLERK: Plaintiffs' No. 52 for identification.

* * * *

MR. WAGMAN: What does it purport to show?

MR. WILKES: This purports to show a view westward on the public alley from approximately eighteen feet west of the Gruis property, at the rear of an automobile which was parked in the right of way at 9:30 this morning, showing a portion thereof in the lower right-hand corner and showing this portion of the right of way and looking down the public alley showing brick which is in the public alley, stacked up, which is beyond the property involved in this case. I offer that as Exhibit 52.

MR. WAGMAN: I object, Your Honor, I can't make head or tail out of that photograph.

THE COURT: Well, nobody has identified it.

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MR. WILKES: Let me have it please.

MR. WAGMAN: If Mr. Wilkes would like to take the stand and identify it, I have no objection.

BY MR. WILKES:

Q. I show you what has been marked Plaintiffs' Exhibit 52 and direct your attention to the telephone pole which is in the right -- and a small portion of a fence which is in the right-hand corner and ask you if you can identify where that is located? Step down and show on Plaintiffs' Exhibit No. 1, if you can identify the photograph. A. This photograph appears to have been taken someplace in the right of way area here looking west down the alley, there are bricks laying out, I believe there is a house down here being restored or work in the back yard right now and those bricks or building materials have been out there for some time. These slabs of concrete and brick start generally in the area here and move down the public alley, and I believe the telegraph poles on our side of the alley come down the north side of the public alley and it is indicating there is a telephone pole on the Ishee property here, which makes them all line up down the alley.

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CROSS EXAMINATION

BY MR. WAGMAN:

Q. Mr. Gruis, were you in the rear of the alley this morning?

A. No, sir, I was not.

Q. Do you know whether or not there were cars parked on the right of way? A. This morning? I was told yes, that there was a car parked on the right of way this morning.

Q. Do you know how many cars were parked on the right of way this morning? A. I do not.

Q. Do you know who this particular car, you were told about, belongs to? A. I do not.

Q. Do you know whether it belongs to the Ishees? A. I do not.

MR. WILKES: I might clarify this photograph. This is not offered for the purpose of showing that an Ishee car was parked on the right of way this morning.

MR. WAGMAN: It does show that a car was parked in the right of way this morning, belonging to some unknown person.

MR. WILKES: I will stipulate to that, Your Honor please.

MR. WAGMAN: Were there any other cars there? What time did you take that photograph?

MR. WILKES: Twenty minutes of ten this morning.

* * * *

BY MR. WAGMAN:

Q. Mr. Gruis, weren't there repairs to the porches and the stairs to the rear of the premises during the course of your remodeling, made by carpenters, contractors? A. Yes, sir.

Q. Did you observe all those repairs, personally? A. I observed the work that was done back there, yes, sir.

Q. When did you observe it, while it was being done or after? A. In progress, yes, sir.

Q. In progress. Were you there when all these spindles were replaced? A. I was there when -- there were some spindles, I believe, they were not only replaced but were put in new; in other words, I am suggesting there might have been one or two spindles that had been kicked out by the former tenancy entirely.

Q. Weren't there spindles that were loose? A. Yes, that is possible.

Q. And it had to be tightened by the carpenter doing the job? A. Yes, that is possible.

Q. Weren't there stair treads that had to be replaced? A. So far as I know, there may have been one board in one set of stairs leading up to the third floor that was replaced, yes, sir, but the stairs were not generally rebuilt, they were essentially the same stairs.

Q. Is it possible there were any loose stair treads on the way up that were not replaced but were nailed back down? A. That is possible, that I don't know.

Q. Is it possible there were some stair treads replaced, of which you are not aware? A. Well, anything is possible along this line, sir.

Q. Were you there when the painters were spraying the paint on the back part of the house? A. Yes, sir, I was.

Q. Were you aware that they had also sprayed paint on the Ishee car which was parked on the Ishee property? A. I certainly wasn't.

MR. WILKES: Objection, Your Honor please, that is not an issue in this case.

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MR. WAGMAN: Just a matter of his observation, Your Honor, we are not claiming any damage.

THE COURT: I don't want to go into a lot of observation that isn't required for disposition of this case, so I will sustain the objection.

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V
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JOHN S. HALL

called as a witness on behalf of the defendants, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WAGMAN:

Q. Will you please state your full name and address? A. John S. Hall, Real Estate Assessor for the District of Columbia.

Q. Are you here in response to a subpoena, sir? A. Yes, sir.

Q. What are your duties in the Office of the Assessor? A. Well, I am charged with the responsibility of assessing, evaluating properties for assessment purposes.

Q. Now, is Square 734 part of the area which you cover? A. Yes, it is.

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Q. Do you have with you records pertaining to Square 734 and to Lot 849 in that square? A. Yes, I do.

Q. And 848 as well? A. Yes.

Q. Are these the records that are kept in the ordinary course of the business of the Office? A. Yes, sir.

Q. Now, what are the records that you have there, what do you have with you? A. Well, I have a record plat of all the lots in Square 734, number, measured, areas of each, size, shape, and the assessment record cards which show the area, shape of each lot, the rate per square foot of land, and the total valuation of the property.

Q. Directing your attention to the record card for Lot 849--
A. Yes.

Q. -- how far back does that go? A. This card says 98 feet, average of 98 feet.

Q. And how wide is that lot? A. Eight feet.

Q. Now, how far back do the dates on the card that you have go? A. The assessment record card?

Q. The assessment record card. A. Fiscal year 1960.

Q. That is as far back as it goes? A. That is when we commenced preparing record cards for each individual lot in the District of Columbia.

Q. Is there anything on the card that indicates that there is an easement across the rear 12 feet of Lot 849? A. No, sir.

Q. To your knowledge, do any other records in the Office of the Assessor have any indication of an easement across the rear 12 feet of Lot 849? A. Not to my knowledge.

Q. Did you have occasion to revalue this property? A. Yes, sir.

Q. And that revaluation was for the purpose of tax assessment? A. Yes, sir.

Q. Realty property tax assessment? A. That is correct.

Q. When you assessed that lot, did you take into consideration, in determining its value for tax purposes, the fact that an easement existed across the rear 12 feet of that lot? A. I wasn't aware there was an easement, so I didn't.

Q. So therefore, you did not take that into consideration, is

that correct? A. That is correct.

Q. If you had known of the existence of an easement, would this have altered the tax rate that would have been put upon that lot? A. The tax rate, you mean the valuation per square foot? It would have been adjusted, yes.

V 6 Q. Would it have been adjusted upward or downward? A. I'd have to figure that out on our depth rule, we would have taken the measure of the lot as it -- well, the northern part, we will say, excluding that easement, and put that on a depth rule to figure the value of it.

THE COURT: Put it on a what?

THE WITNESS: A depth rule, we use a depth rule.

THE COURT: Depth rule, you mean that your assessment would be by some square foot rate down to it?

THE WITNESS: Yes, it is. We have a street rate that is fixed first, that is for equalization, and then that is computed on a depth rule, the deeper the lot, we use 100 feet as a typical depth and anything over 100 feet, that rate per square foot would be reduced; conversely, anything that is shallower than 100 feet, the rate would be increased.

THE COURT: Go ahead, Mr. Wagman.

Q. Then, if you had known of the existence of the easement, the number of square feet that the easement would have occupied would have been deducted from your appraisal, is that correct? A. No, we wouldn't have any authority to split this lot, we would use the entire area of the lot but the rate would be adjusted by reason of this easement.

V 7 Q. To your knowledge, have any of the taxes that have been assessed against Lot 849 ever been adjusted because of the easement, in prior years? A. From looking at the record that I have here, I would say no, because the rate per square foot has been the same.

CROSS EXAMINATION

BY MR. WILKES:

Q. Mr. Hall, you stated that your records, dating back to 1919-- is that my understanding, that they date back to 1919? A. No, I haven't looked at anything back there. I have no record of any

assessment back of the 1960 assessment, except what shows on a card for the fiscal year 1959.

Q. I see. A. Now, the rate on the sales card when the property went to sale, which I have nothing to do with, has been the same, it is about the same amount of tax.

Q. So, if there were an easement of record with respect to the rear 12 feet of Lot 849, any time between the beginning of the world to 1960, you would not have any record which would reflect whether or not that appeared among the assessment records or not? A. That is right, I have no record.

Q. When did you make the appraisal, sir, of Lot 849? A. The latest appraisal, September 17, 1962, that was for the fiscal year 1964.

Q. That was for fiscal 1964? A. Yes.

Q. That was for the appraisal for the period beginning July 1 of 1963? A. That is correct.

Q. So you never made any appraisal for any period that would affect the taxes of the District of Columbia against Lot 849, excepting to the extent that they might be affected for the period commencing July 1, 1963 and ending June 30, 1964, is that correct, sir? A. That is correct, except I had reviewed the property prior to this date, but that is routine.

Q. Under the law, Mr. Hall, you, in making an appraisal for purposes of assessment for tax purposes in the District of Columbia, are required to make an inspection of the property, are you not, sir? A. That is correct.

Q. Now, you made an inspection of Lot 849? A. Yes.

Q. How did you get there, sir, did you walk up the public alley? A. I don't remember.

Q. You don't remember? A. I don't remember. I do thousands of them and walk hundreds of squares.

Q. Do you remember viewing the rear 12 feet of Lot 849? A. I remember seeing the rear of it because I am in there from time to time.

Q. Did it appear to be a public alley or a right of way used for ingress and egress, the rear 12 feet? A. I haven't seen the lot for a long time, I wouldn't remember that.

Q. You wouldn't remember whether or not there appeared to be a right of way there or not? A. That is right.

THE COURT: Since you don't remember going there, how do you know what you considered?

THE WITNESS: Well, we look at every property, we do thousands of them, we have the map and when we review property, it is principally for the purpose of looking at the improvements, looking at the lot on the ground with a plat.

THE COURT: I realize all of that. But you don't remember--

THE WITNESS: I don't remember the easement or any alley way there. I faintly remember the area, because the last time I was in that particular area was to assess an apartment house that had been renovated on Second Street and I remember looking out back of that apartment house. As I remember, it had steps down the back and I thought that there was an opening that they could go through there.

BY MR. WILKES:

Q. If there is an easement created by deed, there is an attempt on behalf of the assessor to pick that up and keep it among the records for your benefit, of course, isn't it? A. Yes, that is right.

Q. And Plaintiffs' Exhibit No. 2 for identification, which contains a provision with respect to a right of way over the rear 12 feet of Lot 849 and 848, that does not appear among your records, is that correct, sir? A. To my knowledge, no.

Q. This deed, sir, is dated January 10, 1919; did you check back and see whether or not, of record, such a right of way had been created? A. No, sir.

Q. So, that's just something you didn't do or that the record erroneously didn't reveal, isn't that correct, sir? A. That is right, there is nothing on our plat that would indicate that, we don't go and search for it, we couldn't, we don't have time, we handle thousands of properties, we couldn't search every piece to see whether there is an easement.

MR. WAGMAN: I object to the questioning of plaintiffs' counsel. The deed for that Exhibit No. 2 does not show any right of way over, that it ran over Lot 849, it only pertains to Lot 848.

MR. WILKES: Your Honor please, this is a matter of argument.

To answer the objection, I must merely refer to the exhibits with respect to the language, if Your Honor please, that this is a conveyance of all of original Lot 18 in Square 734, except the west 8-foot front by the depth thereof, subject to a right of way over the rear 12 feet thereof for the benefit of original Lot 2 and sublot B in said square. The exhibit which shows what original Lot 2 consists of, by its measurements, clearly shows that all of original Lot 2, with the exception of the 8 feet thereof, is a distance of 56 feet, that the east line of lot 848 is the east line of original Lot 2, and that the 56 feet, when measured from the northeast corner of the land now owned by Ishee, extends the 48-foot in the original Ishee lot the 8 feet that they purchased by tax deed during the pendency of this action, June 30, 1963, which totals the 56 feet, which clearly establishes a record that there is a right of way of record for the benefit of Lots 800, 66, 65, 64 and B, over the rear 12 feet of Lot 848 and 849, and which has been on record since January 10, 1919.

THE COURT: Mr. Wilkes, I remember all of that, but this witness is testifying to the Assessor's records and the Assessor's records are not necessarily the land records.

THE WITNESS: That is right.

MR. WILKES: That is correct, Your Honor. He has objected on the basis that there is no right of way of record on Lot 849 and my response to that objection is that the certified copy of the deed of the Recorder of Deeds reflects that there has been a right of way of record.

THE COURT: Now, that exhibit number is -- ?

MR. WILKES: Exhibit No. 2, if Your Honor please.

MR. WAGMAN: May it please the Court, the Court Order which gave rise or permitted the trustees to transfer this property did not call for any right of way, did not authorize them to provide a right of way. This is the reservation that was made by the trustees and to which the defendants have objected.

THE COURT: Didn't the Court approve the report of the trustees?

MR. WILKES: If Your Honor please, the appraisers recommended a 10-foot right of way.

THE COURT: I remember all that.

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THE COURT: That is the lot nearest to --

MR. WAGMAN: This is the lot right here, now owned by
Horton.

THE COURT: Yes.

MR. WAGMAN: There was a report on this and the order requested from the Court and given by the Court was for the sale of that lot with a right of way. That order was subsequently vacated.

THE COURT: I know all of that.

MR. WAGMAN: On January 7, 1919, after a request by the trustees to sell all of Lot 18 except for the west 8 feet, there was an order signed by the Court which read to this effect:

V
15 "Upon consideration of the report of Daniel Allman, Jr. and Margaret Connor, trustees, filed herein this day and the consent of all parties now interested therein to the ratification of this sale thereby reported, it is accordingly this 7th day of January, A.D. 1919, adjudged, ordered, and decreed, that the sale by said trustees to Marie Duff for \$3,300, subject to a brokerage to John F. Donohoe & Sons, Incorporated, of 5% thereon, of Lot 18 in Square 734, improved by a double-frame building at 147-149 D Street, S.E., in the District of Columbia, is hereby finally ratified and confirmed and said trustees, upon the payment of the purchase money to them and in compliance with the terms of the sale, shall execute and deliver to her a deed in fee simple therefor.

Signed, Jennings Bailey, Justice."

V
16 In addition, there was an error, because it should have been Lot 18 less the west 8 feet. In addition, when the trustees gave a deed, they made a reservation in favor of all of Lot B, which included the lot now owned by Mrs. Grigsby, Lot 800, which was not a part of the estate and not a part of the property that the trustees had any control over, nor could they give a reservation in favor of a stranger over that lot. So that there were a number of errors in the order of the trustees which were not with the approval of the Court and, undoubtedly, without the knowledge of the Court and, therefor, we say the easement by grant does not exist and is invalid.

MR. WILKES: Now, he has referred to January 7, Your Honor

please. The consents of the parties to this action, who would certainly overcome any objection that might otherwise arise by reason of the fact that the Grigsby property, for which the right of way was additionally created, was not a part of the Allman estate, date from November 20, 1915--

THE COURT: November 20 of 19 -- what?

MR. WILKES: 1915, the original consent which --

THE COURT: Do you all want to finish with this witness? We are arguing this point and here he is sitting up here waiting.

MR. WILKES: You are correct, Your Honor. I will reserve that for argument. I have just one further question.

BY MR. WILKES:

Q. As I understand, Mr. Hall, it is your testimony that you don't even check the records with respect to a right of way that was created back as far as 1915 because you just physically don't have time to do it, is that right? A. That is correct, if it doesn't show on this plat, we don't search for it. We do not search for it.

THE COURT: And this plat is made by whom?

THE WITNESS: This plat is made by the draftsman employed by the Assessor's Office.

BY MR. WILKES:

V
17 Q. Now, when you go out and inspect a piece of property, let's assume that there is a lot such as a -- Let's call it Lot 899, an imaginary lot, and let's say that on your plat you look at it and it doesn't show anything in connection with a right of way and when you go out and, as required by law, look at it and let's say that it is a paved alley and there is a public alley on both sides of it, you would take, in this imaginary circumstance, you would take into consideration in connection with either the assessment or the rate that the sole use is for a right of way, would you not, sir? A. Yes, things like that, we would probably look into, yes.

* * * *

REDIRECT EXAMINATION

BY MR. WAGMAN:

Q. Mr. Hall, you said the Surveyor for the Office of the Assessor makes that plat, does he not? A. The draftsman.

Q. And what records does he use for that, to your knowledge?

A. He uses the records from the combination of the Surveyor's Office, and when deeds are recorded, information on the deeds, metes and

bounds description, he gets all the subdivided lots from the Surveyor's Office.

Q. And he takes into account all the available records pertaining to those various Lots, is that correct? A. I think so, yes.

EXHIBITS PRESENTED AT TRIAL
DECEMBER 2 - 6, 1963

Pursuant to orders of the United States Court of Appeals for the District of Columbia Circuit, issued on July 14, 1964, September 23, 1964, and October 15, 1964, Appellants and Appellees are permitted to refer to the following original exhibits in lieu of printing the same in the Joint Appendix:

Plat Maps:

Plaintiffs' Exhibits No. 1 and No. 41
Defendants' Exhibit No. 1

Photographs:

Plaintiffs' Exhibits:

Nos. 17-29 inclusive
Nos. 31-38 inclusive
Nos. 39-40 inclusive
Nos. 45-46 inclusive
Nos. 48-52 inclusive

Defendants' Exhibits:

Nos. 2 - 10 inclusive
Nos. 14-17 inclusive
Nos. 21-24 inclusive
Nos. 26-34 inclusive

Survey Diagrams:

Plaintiffs' Exhibit No. 38 - Survey, Lot 46, Folger Apartment.

Defendants' Exhibit No. 25 - Survey, Lots 848 and 849.

Blueprint of Alley in Square 734:

Plaintiffs' Exhibit No. 53 (District Court Case No. 884)

PLAINTIFFS' EXHIBIT No. 2

Daniel Allman, Jr., et al, Trs.) No. 66. Recorded Jan. 10, 1919
to) COURT TRUSTEES DEED. at 2:16 P.M.
Marie Duff)

THIS DEED, Made this Ninth day of January, A.D. 1919,
by and between Daniel Allman, Jr., and Margaret Connor, as Trustees,
parties of the first part, and Marie Duff, party of the second part:

WHEREAS, by virtue of a decree of the Supreme Court of the District of Columbia, passed on the Thirty-first day of May, 1916, in the Equity Cause pending in said Court known as number 34055 in Docket, wherein Daniel Allman, Junior and others are complainants and Margaret Connor and others are defendants, the parties of the first part were appointed trustees to sell the hereinafter described land and premises, and did, in pursuance of said decree, on the 7th day of January, 1919, make sale of the said hereinafter described land and premises and appurtenances for the sum of Three Thousand, Three hundred (\$3,300) Dollars unto Marie Duff.

AND WHEREAS, the said sale was duly reported to said Court and was finally ratified and confirmed by its further decree passed in said cause on the Seventh day of January, 1919.

AND WHEREAS, in accordance with the terms and requirements of said decrees and the proceedings in said cause, the purchase money aforesaid has been duly paid by the party of the second part to the parties of the first part and the said party of the second part is therefore entitled to this deed.

N O W, T H E R E F O R E, T H I S D E E D W I T N E S S E T H, That the parties of the first part, in consideration of the premises, and of the purchase money aforesaid to them paid by the party of the second part, receipt of which, before the sealing and delivery of these presents, is hereby acknowledged, have granted, and by these presents do grant unto the party of the second part, in fee simple, the following described land and premises, situate, lying and being in the City of Washington, District of Columbia, and known and described as follows: All of Original Lot Eighteen (18) in Square Seven hundred Thirty-four (734), except the West

Eight (8) feet front by the depth thereof subject to a right of way over the rear Twelve (12) feet thereof for the benefit of Original Lot Two (2) and sub Lot B in said Square.

TOGETHER with the improvements, ways, easements, rights, privileges and appurtenances to the same belonging, or in any wise appertaining, free, clear, and discharged from all claim, title, interest, lien and demand whatsoever of the parties to the cause aforesaid, or any or either of them, and of all persons claiming under them, or any of them.

I N W I T N E S S W H E R E O F, the parties of the first part have hereunto set their hands and seals on the day and year first above written.

Signed, sealed and delivered
in the presence of -

Clarence F. Donohoe \$3.50 Int. Rev.
Stamps Affixed

/s/ Daniel Allman, Jr., (SEAL)
TRUSTEE

/s/ Margaret Connor, (SEAL)
Trustee

D I S T R I C T O F C O L U M B I A, T O WIT:

I, Clarence F. Donohoe, a Notary Public in and for the said District of Columbia, DO HEREBY CERTIFY, that Daniel Allman, Jr., and Margaret Connor, of the District of Columbia, Trustees, parties to a certain Deed bearing date on the 9th day of January, A.D. 1919, and hereunto annexed, personally appeared before me in the said District of Columbia, the said Daniel Allman, Jr., and Margaret Connor, being personally well known to me to be the persons who executed the said Deed and acknowledged the same to be their act and deed.

GIVEN under my hand and Official seal this 9th day of January, A.D. 1919.

(NOTARIAL SEAL)

/s/ Clarence F. Donohoe,
Notary Public, D.C.

Del. to Grantee 2-11-19

RECODER OF DEEDS
Washington
(SEAL)

This is to certify that the pages attached hereto constitute a full, true, and complete copy of A COURT TRUSTEES DEED BY AND BETWEEN DANIEL ALLMAN, JR., ET AL., GRANTORS, AND MARIE DUFF, GRANTEE, DATED THE 9TH DAY OF JANUARY, 1919, AND RECORDED ON THE 10TH DAY OF JANUARY, 1919, at 2:16 P.M., IN LIBER NO. 4116, FOLIO 447 as the same

appears of record in this office.

IN TESTIMONY WHEREOF, I have hereunto set my hand
and caused the seal of this office to be affixed, this the 15th
day of November, A.D. 1963.

PETER S. RIDLEY,
Recorder of Deeds, D.C.

(S E A L)

By Eleanor Dague Williams
Deputy Recorder of Deeds
D.C.

PLAINTIFFS' EXHIBIT No. 3

DEED, dated August 3, 1945, recorded in Liber No. 8139, folio 519, of the Land Records of the District of Columbia.

John D. Neumann and Elizabeth Neumann, his wife, Grantors
May Meaders and Lydia Meaders, his wife, Grantees

Description

The east 48.17 feet front on "A" Street by the full depth thereof of original Lot 18 in Square 734, known now purposes of assessment and taxation as Lot 848 in Square 734, subject to right of way over rear 12 feet thereof for the benefit of original Lot 2 in the subdivision of Lot B in Square 734.

PLAINTIFFS' EXHIBIT No. 4

DEED, dated November 30, 1951, recorded December 10, 1951, in Liber 9610, folio 529 of the Land Records of the District of Columbia.

May Meaders et ux., Grantors
Tommy C. Ishee et ux., Grantees

Description

The east forty-eight and seventeen hundredths (48.17) feet front on "D" Street by the full depth thereof of Original Lot numbered Eighteen (18) in Square numbered Seven Hundred and Thirty-Four (734) being now known for purposes of assessment and taxation as Lot numbered Eight Hundred and Forty-Eight (848) in Square numbered Seven Hundred and Thirty-Four (734).

Subject to a right of way over the rear Twelve (12) feet thereof for the benefit of original Lot Two (2) and subdivision Lot "B" in said Square.

PLAINTIFFS' EXHIBIT No. 5

DEED, dated October 14, 1937 and recorded October 20, 1937 in Liber 7163, folio 434 of the Land Records of the District of Columbia.

William H. McCray et ux., Grantors
David Bernstein et ux., Grantees

(Plaintiffs' Exhibit No. 5 - cont.)

Description

Lots lettered "F" and "G" in W. W. Corcoran's subdivision in Square numbered Seven Hundred and Thirty-Four (734) as per plat recorded in the Office of the Surveyor for the District of Columbia in Liber W. F. at folio 216, now known as Lot numbered Forty-Six (46) in William H. McCray's combination of the above lots as per plat recorded in said Surveyor's Office in Liber 30 at folio 113.

PLAINTIFFS' EXHIBIT No. 6

DEED, dated June 5, 1903 and recorded June 6, 1903 in Liber 2725, Folio 458 of the Land Records of the District of Columbia.

Lydia G. Conkling, Grantor
William H. McCray, Grantee

Description

All of Lots "F" and "G" in Corcoran's subdivision of original Lot numbered One (1) in Square numbered Seven Hundred and Thirty-Four (734) as the same is recorded in the Office of the Surveyor for the District of Columbia. Each lot subject, however, to a certain deed of trust, which trusts the parties of the second part assumed and agrees to pay, together with the improvements, rights, privileges and appurtenances to the same belonging.

PLAINTIFFS' EXHIBIT No. 7

DEED, dated September 23, 1947 and recorded October 14, 1947 in Liber 8599, folio 189, of the Land Records of the District of Columbia.

Ida Bernstein, surviving tenant by the entirety of
David Bernstein, deceased, Grantor
Odell Blount, in her sole and separate estate, Grantee

Description

Lots "F" and "G" in W. W. Corcoran's division in Square 734, as per plat recorded in the Office of the Surveyor for the District of Columbia in Liber W. F. at folio 216, now known as Lot 46 in William H. McCray's combination of above lots, as per plat recorded in said Surveyor's Office in Liber 30 at folio 113.

PLAINTIFFS' EXHIBIT No. 8

DEED, dated October 31, 1947, and recorded November 5, 1947 in Liber 8616, folio 196, of the Land Records of the District of Columbia.

Jebco Maintenance Corporation, a Maryland corporation, acting pursuant to and in strict conformity with a meeting of its Board of Directors and Stockholders, Grantors

Charles H. Chidakel and Tillie Chidakel, his wife, as tenants by the entirety, Grantees

Description

Lots "F" and "G" in W. W. Corcoran's division in Square 734, as per plat recorded in the Office of the Surveyor for the District of Columbia in Liber W. F. at folio 216, now known as Lot 46 in William H. McCray's combination of above lots, as per plat recorded in said Surveyor's Office in Liber 30 at folio 113.

PLAINTIFFS' EXHIBIT No. 9

DEED, dated September 23, 1947 and recorded October 14, 1947 in Liber 8599, folio 191, of the Land Records of the District of Columbia.

Odell Blount, in her sole and separate estate, Grantor John D. Neumann and Joseph F. Bruno, Grantees

Description

Lots "F" and "G" in W. W. Corcoran's division in Square 734, as per plat recorded in the Office of the Surveyor for the District of Columbia in Liber W. F. at folio 216, now known as Lot 46 in William H. McCray's combination of above lots, as per plat recorded in said Surveyor's Office in Liber 30 at folio 113.

PLAINTIFFS' EXHIBIT No. 10

DEED, dated September 23, 1947 and recorded October 14, 1947, in Liber 8599, folio 197, of the Land Records of the District of Columbia.

(Plaintiffs' Exhibit No. 10 - cont.)

John D. Neumann and Joseph F. Bruno, as joint tenants,
Grantors

Jebco Maintenance Corporation, a Maryland Corporation,
Grantees

Description

Lots "F" and "G" in W. W. Corcoran's division in Square 734, as per plat recorded in the Office of the Surveyor for the District of Columbia in Liber W. F. at folio 216, now known as Lot 46 in William H. McCray's combination of above lots, as per plat recorded in said Surveyor's Office in Liber 30 at folio 113.

PLAINTIFFS' EXHIBIT No. 11

DEED, dated September 14, 1956 and recorded October 10, 1956, in Book 10743, page 505, of the Land Records of the District of Columbia.

Dorothea Cristofolio, Grantor

Reed Liggitt and his wife Elizabeth V. Liggitt, as tenants by the entirety, Grantees

Description

Lots "F" and "G" in W. W. Corcoran's division in Square 734, as per plat recorded in the Office of the Surveyor for the District of Columbia in Liber W. F. at folio 216, now known as Lot 46 in William H. McCray's combination of above lots, as per plat recorded in said Surveyor's Office in Liber 30 at folio 113.

PLAINTIFFS' EXHIBIT No. 12

DEED, dated September 14, 1956 and recorded September 25, 1956 in Book 10734, page 403, of the Land Records of the District of Columbia.

Charles H. Chidakel and his wife Tillie Chidakel,
Grantors

Reed Liggitt, Grantee

(Plaintiffs' Exhibit No. 12 - cont.)

Description

Lots "F" and "G" in W. W. Corcoran's division in Square 734, as per plat recorded in the Office of the Surveyor for the District of Columbia in Liber W. F. at folio 216, now known as Lot 46 in William H. McCray's combination of above lots, as per plat recorded in said Surveyor's Office in Liber 30 at folio 113.

PLAINTIFFS' EXHIBIT No. 13

DEED, dated September 14, 1956 and recorded October 10, 1956 in Book 10743, page 503, of the Land Records of the District of Columbia.

Reed Liggitt and his wife Elizabeth V. Liggitt, Grantors
Dorothea R. Cristofoli, Grantee

Description

Lots "F" and "G" in W. W. Corcoran's division in Square 734, as per plat recorded in the Office of the Surveyor for the District of Columbia in Liber W. F. at folio 216, now known as Lot 46 in William H. McCray's combination of above lots, as per plat recorded in said Surveyor's Office in Liber 30 at folio 113.

PLAINTIFFS' EXHIBIT No. 14

DEED, dated November 25, 1960 and recorded February 6, 1961, in Liber 11551, folio 53, of the Land Records of the District of Columbia.

Reed Liggitt and his wife, Elizabeth V. Liggitt, tenants
by the entirety, Grantors

Edward G. Gruis, Grantee

Description

Lots "F" and "G" in W. W. Corcoran's division in Square 734, as per plat recorded in the Office of the Surveyor for the District of Columbia in Liber W. F. at folio 216, now known as Lot 46 in William H. McCray's combination of above lots, as per plat recorded in said Surveyor's Office in Liber 30 at folio 113.

PLAINTIFFS' EXHIBIT NO. 15

(Equity Case No. 34055)

Will of Daniel Allman, Sr.

I, Daniel Allman, of the City of Washington, District of Columbia, being of sound and disposing mind, memory and understanding, do make, public and declare my last will and testament, in manner and form following, that is to say:

* * * *

Item tenth: All of the rest, residue and remainder of my estate and property, real, personal, and mixed, wheresoever the same may be situate, and whensover acquired, including all that which I may own or in which I may have any interest, or to which I may be in any manner entitled, I give, devise and bequeath to my wife Julia Allman, before and during the term of her natural life, and upon her death I give, devise and bequeath all said rest, residue and remainder of my estate and property in fee simple and absolutely, according to its nature as follows:

To my son, Daniel Allman, Jr., one undivided fifth part thereof;

To my daughter, Margaret Connor, one undivided fifth part thereof;

To the children of my deceased daughter, Julia Collins, who may be living at the time of my death, one undivided fifth part thereof in equal shares;

To my daughter Hannah Reidy, one undivided fifth part thereof;

To my children, Daniel Allman, Jr. and Margaret Connor, one undivided fifth part thereof, but in and upon the following trust, that is to say:

In trust to invest, and keep the same invested, in income producing property and out of said income, to pay all taxes, and charges on the same, and out of the net income therefrom, to pay one-fourth thereof to my son William Allman, and to use the other three-fourths of said net income for the education and support of my grandchildren Mattie Allman, Julia Allman and William Allman, Jr.

(the children of my said son William Allman) until the youngest of said grandchildren shall reach the age of 21 years and thereupon or in the event of all these said grandchildren dying before the youngest shall reach twenty one years, whichever event shall first happen, to turn over the whole of the principal of said trust estate to my said son William Allman absolutely and in fee simple, according to the nature of the property, freed and discharged of all trusts, and if my said son William Allman shall die before the youngest of my said three grandchildren shall reach the age of twenty one years, then and in that event the whole of the said trust shall become the property absolutely and in fee simple in equal shares, of such of my said three grandchildren as shall then be living, freed and discharged of all trusts. And if my said son William shall die before the youngest of my said three grandchildren shall reach the age of twenty one years and none of the said three grandchildren shall then be surviving, the whole of my said trust estate shall in that event go immediately in fee simple, and absolutely according to the nature of the property and free and discharged of all trusts to my children then living and the issue of any of my children who may then be dead, in equal shares per stirpes and not per capita.

* * * In witness whereof, I have hereunto set my hand and seal this 12th day of April 1909.

/s/ Daniel Allman.

AGREEMENT OF BENEFICIARIES

This Agreement, made this 20th day of November, A.D. 1915, in the City of Washington, District of Columbia, by and between Daniel Allman, Jr. and Margaret Connor, in their own right and as trustees for William D. Allman, Mattie E. Allman, William M. Allman and Julia Allman, and by Hannah Reidy, Julia A. Collins (Sister M. Joseffa), William J. Collins, Daniel J. Collins, Mattie E. Allman and William M. Allman in their own right, and

WHEREAS, by the Last Will and Testament and Codicil of Daniel Allman, Sr., deceased, dated April 12, 1909, and September 12, 1911,

respectively, which were duly admitted to probate and record on October 15, 1915, the aforesaid parties to this Agreement and William D. Allman and Julia Allman were named as residuary legatees, to share in the following proportions: One undivided fifth share each to Daniel Allman, Jr., Margaret Connor, and Hannah Reidy; one undivided fifth share to the children of a deceased daughter, Julia Collins, who are Julia A. Collins (Sister Joseffa), William J. Collins and Daniel J. Collins, and one undivided fifth share to Daniel Allman, Jr. and Margaret Connor upon the following trust: "To invest and keep the same invested, and from the net income therefrom to pay one-fourth to William D. Allman and the remaining three-fourths to be used for the education and support of the three children of William D. Allman, who are Mattie E. Allman, William M. Allman and Julia Allman, until the youngest child shall reach the age of twenty-one years, and then the whole of said trust estate shall be given to William D. Allman, free and discharged of all trusts. In the event of the said William D. Allman dying before the youngest child shall reach the age of twenty-one years, the whole of said trust estate shall be divided, freed and discharged of all trusts to such children as may then be living. In the event that all three said children die before the youngest shall have reached the age of twenty-one years, the whole of said trust shall be given to William D. Allman, free and discharged of all trusts" and

WHEREAS, included in the residue of the Estate of the said Daniel Allman, Sr., deceased, are eight (8) parcels of real estate, hereinafter described, which were appraised by Mr. Clarence F. Donohue and Mr. George Repetti and which appraisement is hereby approved and made a part of this Agreement, which are incapable of being partitioned in kind, it is

THEREFORE, agreed by the parties hereto, that the said real estate be distributed as follows:

* * * *

That part of Lot Two in Square numbered Seven Hundred and Thirty-Four, improved by a brick dwelling, known as premises No. 170 North Carolina Avenue, S.E. be conveyed to Hannah Reidy.

Appraised value. \$3,590.00

That part of Lot Two in Square Seven Hundred and Thirty-Four,

improved by a brick dwelling known as premises No. 172 North Carolina Avenue, S.E. be conveyed to Margaret Connor

Appraised value \$3,550.00

That part of Lot Two in Square numbered Seven Hundred and Thirty-Four, improved by a brick dwelling known as premises No. 174 North Carolina Avenue, S.E. be conveyed to Daniel Allman, Jr. and Margaret Connor, as trustees, for the trust hereinbefore mentioned;

Appraised value \$3,575.00

Lot B in Square numbered Seven Hundred and Thirty-Four, improved by a frame dwelling, known as premises No. 176 North Carolina Avenue, and Part of Lot Eighteen in Square numbered Seven Hundred and Thirty-Four, improved by a double frame dwelling, Nos. 147-149 D Street, S.E., be conveyed to Daniel Allman, Jr. and Margaret Connor as trustees, to sell the same at their discretion, and to distribute the net proceeds from such sale in the following proportion:

Daniel Allman, Jr.	2415%
Margaret Connor	1732%
Hannah Reidy	1663%
Julia A. Collins (Sister M. Joseffa), William J. Collins, and Daniel J. Collins	2501%
Daniel Allman, Jr. and Margaret Connor, as Trustees for William D. Allman et al.	1689%
	<u>1.0000%</u>

Witnesseth, our hands and seals this 20th day of November, A.D. 1915.

/s/ Daniel Allman, Jr.
 /s/ Margaret Connor
 /s/ Hannah Reidy
 /s/ Julia A. Collins (Sister M. Joseffa)
 /s/ William J. Collins
 /s/ Daniel J. Collins
 /s/ Mattie E. Allman
 /s/ William M. Allman, Jr.
 /s/ William M. Allman, Sr.

In the Supreme Court of the District of Columbia
 Holding an Equity Court

Daniel Allman, Junior	:	
Margaret Allman	:	
Daniel Allman, Trustee	:	
Plaintiffs	:	
v.		
Margaret Connor	:	
Margaret Connor, trustee	:	Equity No. 34055
William D. Allman	:	
Hannah Reidy	:	
Julia A. Collins	:	
William J. Collins	:	
Daniel J. Collins	:	
Lillian C. Collins	:	
Mattie E. Allman (infant)	:	
Julia Allman (infant)	:	
William M. Allman (infant)	:	
Defendants	:	

To the Supreme Court of the District of Columbia holding an Equity Court the plaintiffs respectfully represent as follows:

* * * Sixth: That * * * Daniel Allman, Senior, died seized and possessed of * * * Lot numbered two (2) in Square numbered seven hundred and thirty four (734), improved by premises 170, 172 and 174 North Carolina Avenue, Southeast; Lot lettered "B" in Square seven hundred and thirty-four (734) improved by premises 176 North Carolina Avenue, Southeast; and Lot numbered eighteen (18) in Square numbered seven hundred and thirty-four (734) improved by premises 147 and 149 "D" Street, Southeast. The aforesaid property, together with the aforesaid personal estate constitutes the entire estate of which the said Daniel Allman died seized and possessed.

Seventh: That by his aforesaid last will and codicil the said Daniel Allman, Senior, directed, after the payment of his debts and all legacies bequeathed, that his estate should be divided into five equal parts * * *

Eighth: That by virtue of the aforesaid will the plaintiff, Daniel Allman, Jr. the defendant Margaret Connor, the defendant Hannah Reidy and the defendants Julia A. Collins, William J. Collins and Daniel J. Collins, and the plaintiff, Daniel Allman, Jr. and the defendant Margaret Connor as trustees are seized of all of the aforesaid real estate as tenants in common and are in the sole and exclusive possession thereof * * *

Ninth: That subsequent to the probate of the * * * will and codicil * * * plaintiff Daniel Allman, Junior in his own right and as trustee aforesaid, the defendant, Margaret Connor in her own right and as trustee aforesaid, the defendants William D. Allman, Hannah Reidy, Julia A. Collins, William J. Collins and Daniel J. Collins, entered into an agreement for a division in kind of a part of the aforesaid real estate between them and for a sale of two parcels thereof * * *

Tenth: Plaintiff is advised by Counsel that inasmuch as the aforesaid agreement would not be effective because the aforesaid trustees under the aforesaid will lack the power of partition or division in kind, plaintiff files this bill for the purpose of obtaining a division in kind of the aforesaid real estate in so far as a division in kind may to the Court appear practicable and for a partition by sale of as much thereof as may not be the subject of partition in kind and in this regard plaintiff recommends to the Court that the agreement aforesaid shall be referred to by the Court and in the division of the aforesaid estate that the aforesaid agreement may be recognized and effectuated and the partition in kind be as therein set forth and that trustees be appointed to make sale of that portion of said property which cannot be partitioned and which the parties to this Bill have heretofore agreed to have sold.

*

*

*

*

/s/ Daniel Allman, Jr.

/s/ Margaret Connor

/s/ Daniel Allman, Jr.

Trustee

(Subsequent to the filing of the above request for partition, William Allman, Sr.'s share was taken in default by his failure to appear, after due advertising, at a hearing in Chancery and, on May 13, 1916, Margaret Connor filed with the Office of the Surveyor of the District of Columbia a plat, subdividing the part of Lot Two owned by the Estate of Daniel Allman, and known as premises 174, 172 and 170 North Carolina Avenue, S.E., into Lots 64, 65, and 66, respectively, in Square 734.

APPRAISER'S LETTER

John F. Donohoe & Sons
 (Incorporated)
 Real Estate Brokers
 314 Pennsylvania Avenue, S.E.
 Washington, D.C.

Mr. Daniel Allman
 170 North Carolina Avenue, S.E.
 Washington, D.C.

Dear Sir:

Pursuant to your request that Mr. George R. Repetti and this Office appraise the property belonging to the late Daniel Allman, will say that we have examined the property and after a conference, have placed the following prices on the different properties:

142 C Street, S.E.	\$3150
144 C Street, S.E.	3100
176 North Carolina Avenue, S.E.	2500
174 North Carolina Avenue, S.E.	3575
172 North Carolina Avenue, S.E.	3550
170 North Carolina Avenue, S.E.	3590
147-49 D Street, S.E.	3350

In connection with the D Street property, we recommend that a ten-foot strip be taken off the rear of this lot to be used for alley purposes for both the D Street and North Carolina Avenue property. If this should be done, charge the North Carolina Avenue houses with twenty-five dollars each additional. This would give a direct outlet to the public alley to all of these houses and, to our mind, would be very beneficial for a future market. Should the rear alley be decided on, deduct the amount charged against the North Carolina Avenue houses from the price put on the D Street property.

Our charge for services, twenty-five dollars, twelve dollars and a half to each office.

Very truly yours,

J. F. Donohoe & Sons, Inc.

(This letter, undated, was filed on May 31, 1916 as an Exhibit with the Transcript of Testimony of the Hearing in Chancery held May 11, 1916 before William H. Shipley, Examiner in Chancery.)

In the Supreme Court of the District of Columbia

Daniel Allman, Junior, et al., :
Plaintiffs :
v. : Equity No. 34055
Margaret Connor, et al., :
Defendants :
- - - -

This cause came on to be heard at this term upon the pleadings, testimony and exhibits, all of which have been duly considered, and it appearing that the plaintiffs are entitled to the relief prayed, to which the defendants make no objection of record, it is accordingly by the Court, this 31st day of May, A.D. 1916, adjudged, ordered and decreed as follows:

First. That the decree pro confesso heretofore made herein is now made absolute and final.

Second. That the contract entered into between the parties to this cause on the 20th day of November 1915, appearing reasonable, it is approved.

Third. That in accordance with the will and codicil of the late Daniel Allman, dated respectively April 12, 1909 and September 12, 1911, duly admitted to probate and record, in Administration Cause No. 22103, division of a portion of the real estate, and the proceeds from the sale of a portion thereof is hereby divided into five equal parts and partitioned as follows:

* * * *

To defendant Hannah Reidy is assigned Lot No. 66 in Margaret Connor and others' subdivision of the easterly 46 feet front by the full depth thereof of Original Lot No. 2 in Square No. 734, as per plat recorded in the Surveyor's Office of said District in Book 55 at page 173, being premises No. 170 North Carolina Avenue, S.E.;

To defendant Margaret Connor in her own right, is assigned in fee simple, Lot No. 65 * * * being premises No. 172 North Carolina Avenue, S.E.;

To plaintiff's Daniel Allman, Jr. and defendant Margaret Connor, as trustees under the will of the late Daniel Allman, Sr., in fee simple, as joint tenants, in and upon the following trust * * * is

assigned Lot No. 64 * * * being premises No. 174 North Carolina Avenue, S.E.;

To plaintiff Daniel Allman, Jr. and defendant Margaret Connor, as joint tenants in fee simple, is assigned Lot lettered "B" in Square 734, being premises 176 North Carolina Avenue, S.E., and Lot No. 18 in Square 734, improved by a double frame building, No. 147 and 149 D Street, S.E., to sell under the supervision and direction of this Court, as provided by Equity Rule No. 72,

Provided that said trustees shall first file herein their joint bond with surety to be approved by the Court in the penalty of \$6,000 and

Upon ratification and consummation of the above sale herein provided, said trustees shall, after deducting the costs and expenses of this proceeding other than the compensation to counsel for plaintiff and the defendants, which is to be paid by the respective parties and not out of the fund received from said sale, and costs and expenses incident to the sale of said property, divide and pay the proceeds as follows:

to plaintiff Daniel Allman, Jr.	2415%
to defendant Margaret Connor	1732%
to defendant Hannah Reidy	1663%
to defendants Julia A. Collins, et al.	2501%
to plaintiff Daniel Allman, Jr. and defendant Margaret Connor, as trustees, in and upon the trust set forth in the will of the late Daniel Allman, Sr.	1689%

The aforesaid division of the proceeds from the sale of the properties ordered sold is made to equalize a division of the real estate of the said Daniel Allman, Senior, in five equal parts.

/s/ Wendell P. Stafford,
Justice

(Subsequently, Julia A. Collins et al. deeded their share in premises 176 North Carolina Avenue, S.E. and 147-149 D Street, S.E., to Daniel Allman, Jr., so that the share of Daniel Allman, Jr., in these properties became 4916/1000%)

Trustees' Request for Placing Right of Way Over Rear 12
Feet of "Lot 18" for the Benefit of Lots Two and "B" and
for Approval of Sale of Lot "B"

(Filed September 17, 1918)

In the Supreme Court of the District of Columbia
Holding an Equity Court

Daniel Allman, Junior, et al., :
Plaintiffs :
v. : Equity No. 34055
Margaret Connor, et al., :
Defendants :

Report of Daniel Allman, Junior, and Margaret
Connor, Trustees

By decree of this Court in this cause of May 31, 1916, said
Trustees were ordered to sell, inter alia, Lot B in Square 734,
being premises 176 North Carolina Avenue, S.E., and have duly qual-
ified as such Trustees.

Inasmuch as no favorable opportunity was afforded to sell the
said property at public auction at anything near its fair market
value, said trustees refrained from offering it at public auction,
but have tried to sell it at private sale, believing that a much
better price could be realized for it by that method of sale;

That they have received from William H. Richardson, through
John F. Donohoe & Sons, Inc., real estate brokers, a cash offer
of \$2800 for said property, which is subject to a brokerage of 5%
to said brokers; that said offered price is fair and more than it
could be realized for said property by public auction sale and
therefore said Trustees recommend its acceptance and approval by
the Court.

That there is one condition annexed to the said sale which
your Trustees also recommend as reasonable, namely, that a per-
petual right of way for the benefit of Lots Two (2) and said Lot
"B" over the rear 12 feet of Lot 18 in said Square, also involved
in this cause and held by your Trustees for sale, be allowed.

Your Trustees have procured the consent of all parties con-
cerned in the sale of the said property to the acceptance of the

(Trustees' Petition of September 17, 1918 - cont.)

above offer and they attach their signatures hereto as evidence of that fact.

The premises considered, your Trustees pray that the said sale be confirmed and that they be authorized and empowered to convey the said property with the right of way aforesaid unto the said purchaser upon the payment of the purchase money.

/s/ Daniel Allman, Jr.,
Trustee

/s/ Margaret Connor,
Trustee

District of Columbia, ss:

We do solemnly swear that we have read the foregoing report by us as Trustees subscribed and know the contents thereof; that the facts stated therein are true of our own personal knowledge.

/s/ Daniel Allman, Jr.

/s/ Margaret Connor

Subscribed and Sworn to before me this 14 day of September,
A.D. 1918.

/s/ Clarence F. Donohoe,
Notary Public, D.C.

We hereby consent to the
immediate ratification and approval
of the above reported sale.

/s/ Daniel Allman, Jr.

/s/ Daniel Allman, Jr., Trustee

/s/ Hannah Reidy

/s/ Margaret Connor

/s/ Margaret Connor, Trustee

Court Order Approving Sale of Lot "B" With Right of
Way Over Rear 12 Feet of Lot "18" In Favor of Owner
of Lots Two and "B"

(Filed September 17, 1918)

In the Supreme Court of the District of Columbia
Holding an Equity Court

Daniel Allman, Jr., et al., :
Plaintiffs :
v. : Equity No. 34055
Margaret Connor, et al., :
Defendants :

Upon consideration of the report of Daniel Allman, Jr., and Margaret Connor, Trustees, filed herein this day, and the consent of all the parties now interested therein to the ratification of the sale thereby reported, it is accordingly this 17th day of September, A.D. 1918, adjudged, ordered and decreed that the sale by said Trustees to William H. Richardson for \$2800.00 cash, subject to a brokerage to John F. Donohoe & Sons, Inc., thereon of five per cent, of Lot lettered "B" in Square 734, being premises 176 North Carolina Avenue, Southeast, in said District, is hereby finally ratified and approved, and said trustees, upon the payment of the purchase money to them by said purchaser, shall execute and deliver to him a fee simple title thereto, together with the perpetual right of way, for alley purposes, over the rear 12 feet of Lot 18 in said Square, in favor of the owner of Lots Two (2) and said Lot "B" in said Square.

/s/ Ashley Gould
Justice

Trustees' Request for Court Approval of Sale of Lot "18"
(Filed January 7, 1919)

In the Supreme Court of the District of Columbia

Daniel Allman, Jr., et al., :
Plaintiffs :
v. : Equity No. 34055
Margaret Connor, et al., :
Defendants :

Report of Daniel Allman, Jr. and Margaret
Connor, Trustees

By decree in this Cause of May 31, 1916, said trustees were appointed to sell, inter alia, Lot numbered eighteen (18) in Square numbered seven hundred and thirty-four (734) in the District of Columbia, improved by a double frame building No. 147 and 149 D Street, S.E., and said trustees duly qualified as such.

Inasmuch as no favorable opportunity was afforded to sell the said property at public auction at any price near its fair market value, the trustees refrained from offering it at public auction sale but have endeavored to sell it at private sale believing that a much better price could be realized therefor by that method; that they have received from Marie Duff, through John F. Donohoe & Sons, Real Estate Brokers, an offer of \$3300.00 subject to a brokerage of 5% to said brokers. That said price is fair and reasonable and more than what could be realized for said property at public auction and therefore said trustees recommend its acceptance and approval by the Court.

The terms of the said purchase being that all of the purchase money is to be paid in cash with the exception of \$500.00 which is to be represented by a second deed of trust upon the property.

Your trustees have procured the consent of all parties concerned in the sale of the said property to the acceptance of the said offer and they attach their signatures hereto as evidence of that fact.

The premises considered, your said trustees pray that the sale be confirmed and that they be authorized and empowered to convey

(Trustees' Petition of January 7, 1919 - cont.)

the property to the purchaser thereof upon compliance with the terms of sale.

/s/ Daniel Allman
/s/ Margaret Connor

George C. Gertman
Attorney

DISTRICT OF COLUMBIA, ss:

We do solemnly swear that we have read the foregoing report by us subscribed and know the contents thereof; that the facts therein stated of our own personal knowledge are true and those stated as upon information and belief we believe to be true.

/s/ Daniel Allman
/s/ Margaret Connor

Subscribed and sworn to before me this 4th day of January, A.D. 1919.

/s/ Clarence F. Donohoe,
Notary Public, D.C.

We consent to the ratification of the above sale by the Court.

/s/ Daniel Allman
/s/ Margaret Connor
/s/ Hannah Reidy

Court Order Approving Sale of Lot 18

(Filed January 7, 1919)

In the Supreme Court of the District of Columbia
Holding an Equity Court

Daniel Allman, Jr., et al.,	:	
Plaintiffs	:	
v.	:	Equity No. 34055
Margaret Connor, et al.,	:	
Defendants	:	

Upon consideration of the Report of Daniel Allman, Jr., and Margaret Connor, trustees, filed herein this day and the consent of all the parties now interested therein to the ratification of the sale thereby reported, it is accordingly, this 7th day of January, A.D. 1919, adjudged, ordered and decreed that the sale by said trustees to Marie Duff for \$3300.00, subject to a brokerage to John F. Donohoe & Sons, Inc., of 5% thereon, of Lot No. 18 in Square 734, improved by a double frame building, No. 147, 149 D Street, S.E. in the District of Columbia, is hereby finally ratified and confirmed and said trustees, upon the payment of the purchase money to them, and compliance with the terms of sale, shall execute and deliver to her a deed in fee simple therefor.

/s/ Jennings Bailey
Justice

Trustees' Report of Distribution of Proceeds From
Sale of Lot 18

(Filed January 23, 1919)

In the Supreme Court of the District of Columbia
Holding an Equity Court

Daniel Allman, Jr., et al.,	:	
Plaintiffs	:	Equity No. 34055
v.		:
Margaret Connor, et al.,	:	
Defendants	:	

Daniel Allman, Jr. and Margaret Connor, trustees, respectfully report as follows:

First. The sale by them of Lot "B" in Square 734, heretofore to wit, September 17, 1918 reported to the Court and on that day duly ratified, has never been consummated and the deposit has been returned to the purchaser because of the inability of the trustees to give him the alley privileges over property of others which his purchase contemplated.

Second. That they have closed the sale of Lot 18 in Square 734, premises No. 147 and 149 D Street, S.E. to Marie Duff for \$3300.00.

Third. Since the decree of partition in this Cause, the defen-

dants, Julia A. Collins, William A. Collins and Daniel J. Collins have sold and conveyed to the plaintiff, Daniel Allman, Jr., all their right, title, interest and estate in the aforesaid property (See Deed dated September 13, 1917, recorded November 20, 1917, in Liber 4032 at folio 210 et seq.) and said Allman is now possessed of and entitled to their share, 2501/1000 percent in the proceeds aforesaid, making his total share 4916/1000 percent.

Fourth. That their account of the aforesaid sale is as follows:

Dr.	to purchase price	\$ 3300.00
Cr.		
By commission 5% to John F. Donohoe & Sons on sale as per order Court	\$ 165.00	
Commission of trustees under Equity	129.00	
Rule 72	3.50	
Revenue stamps on deed	15.00	
Taxes accrued, part year 1918	50.00	
Attorney fee, George C. Gertman	2967.50	
Bal. for distribution	\$ 3300.00	

(Trustees' Report of January 23, 1919 - cont.)

Said balance being distributable as follows:

Daniel Allman, Jr.	4916/1000%	\$1458.81
Margaret Connor	1732/1000%	513.97
Hannah Reidy	1663/1000%	493.49
Daniel Allman and Margaret Connor, trustees	1689/1000%	501.23

And they have paid over the same according to the respective parties as is evidenced by their signature hereto. They have also distributed all rent collected from the property.

/s/ Daniel Allman, Trustee
/s/ Margaret Connor,
Trustee

We and each of us hereby acknowledge the receipt from Daniel Allman, Junir, and Margaret Connor, as Trustees, of the proceeds of the said sale; the amount received by us, respectively, being set opposite our names above.

/s/ Daniel Allman
/s/ Margaret Connor
/s/ Hannah Reidy
/s/ Daniel Allman,
Trustee
/s/ Margaret Connor,
Trustee

Subscribed and Sworn to by said Trustees before me this 21
day of January, 1919.

/s/ Clarence F. Donohoe,
Notary Public

In the Supreme Court of the District of Columbia

Daniel Allman, Jr., et al.,	:	
Plaintiffs	:	
v.	:	Equity No. 34055
Margaret Connor, et al.,	:	
Defendants	:	

Upon consideration of the Report of Daniel Allman, Junior, and Margaret Connor, trustees, filed herein, together with the written consent by all the parties concerned to its approval by the Court, it is, therefore, by the Court this 23rd day of January, A.D. 1919, ORDERED, that said report be and it is hereby finally ratified and approved.

/s/ William Holtz
Justice

Trustees' Petition for Court Approval of Sale of
Lot "B" to William and Sarah Belinsky

In the Supreme Court of the District of Columbia

Daniel Allman, Junior, et al., :
Plaintiffs
v. : In Equity No. 34055
Margaret Connor, et al., :
Defendants :
:

Daniel Allman and Margaret Connor, trustees, respectfully report to the Court as follows:

1st: They were heretofore appointed trustees to sell the hereinafter described real estate.

2nd: They heretofore sold the same to William H. Richardson for \$2800.00 and the sale was duly ratified by the Court, but inasmuch as the purchaser could not obtain the necessary right of way over adjoining properties that his purchase contemplated, the said sale was never closed and the deposit was returned to him. Therefore it becomes necessary to vacate the decree confirming said sale.

3rd: Your trustees have now procured, through John F. Donohoe & Sons, Incorporated, a cash offer of \$2800.00 from William Belinsky and his wife Sarah Belinsky, as joint tenants, for Lot "B" in Square 734, being premises No. 176 North Carolina Avenue, Southeast. Said sale being subject to a brokerage of five per cent to said Real Estate Brokers.

4th: All the parties concerned in the sale of said property have consented to the immediate ratification of the above sale as is evidenced by their signatures to the decree to be submitted herewith.

5th: Accordingly your trustees recommend the ratification of said sale.

/s/ Daniel Allman, Jr., Trustee
/s/ Margaret Connor, Trustee

George C. Gertman
Attorney

Court Order Approving Sale of Lot "B" to William Belinsky and Sarah Belinsky, his wife

In the Supreme Court of the District of Columbia

Daniel Allman, Jr., et al., :
Plaintiffs :
v. : Equity No. 34055
Margaret Connor, et al., :
Defendants :

It is by this Court this 5th day of February 1919, upon consideration of the Report filed by Daniel Allman, Jr. and Margaret Connor, trustees,

Ordered, that the decree herein heretofore confirming sale of the hereinafter mentioned property to William H. Richardson is hereby vacated and set aside, and that the sale by said trustees to William Belinsky and Sarah Belinsky, as joint tenants, for \$2800 cash of Lot lettered "B" in Square 734, subject to a brokerage of 5% to John F. Donohoe & Sons, Inc. is hereby approved, and upon the payment of the purchase money said trustees shall convey the property to them.

/s/ Jennings Bailey
Justice

We consent to the above decree,
being the only persons interested
in the proceeds.

/s/ Daniel Allman, Jr.
/s/ Margaret Connor
/s/ Hannah Reidy

On February 18, 1919, Daniel Allman, Jr. and Margaret Connor, trustees, reported to the Court that they had distributed the proceeds of the sale. To this report were affixed the following statement and signatures:

"We and each of us hereby acknowledge the receipt from Daniel Allman, Junior and Margaret Connor, as trustees, of the proceeds of said sale, the amount received by us, respectively, being set opposite our names above.

/s/ Daniel Allman, Jr.

/s/ Margaret Connor

/s/ Hannah Reidy

/s/ Daniel Allman, Jr.,
Trustee

/s/ Margaret Connor,
Trustee"]

PLAINTIFFS' EXHIBIT NO. 16

Washington, D.C., July 25th,
1924

Mr. Bruienger

To M. G. YOST Dr.
CONTRACTOR AND BUILDER
631 East Capitol Street

Building garage by contract	\$ 875.00
Extra concreting, footings & brick-work	32.00
" tinning	10.00
Lumber	5.00
	<hr/>
	\$ 922.00

Received payment, /s/ M. G. Yost

PLAINTIFFS' EXHIBIT NO. 30

DISTRICT OF COLUMBIA
DEPARTMENT OF LICENSES AND INSPECTIONS

Washington, D.C., April 25, 1961

Order for the correction of conditions at 411 Second St., S.E.

Mr. Edward Gruis No. 326 - 2nd St., S.E.

You are hereby ordered to repair dilapidated fence front and
rear yards. Sec. 2514 D. C. Housing Reg.

This order may be complied with by the removal of fence.

The Director directs you to comply
with this order by 5/29/61
otherwise court proceedings may be
initiated for the enforcement there-
of.

By order of the Director
of Licenses and Inspections
/s/ K. Goodale
Inspector - Housing
Division

PLAINTIFFS' EXHIBIT NO. 42

REALTY TITLE INSURANCE COMPANY, INC.

Home Office: 1424 K Street, N.W. Washington 5, D.C. Sterling 3-5000

December 2, 1963

James C. Wilkes, Jr., Esq.
 c/o Wilkes & Artis
 Tower Building
 Washington, D.C.

Dear Mr. Wilkes:

We have examined title to the herein described property from January 1, 1924 through December 31, 1941 and find title to said property, according to the records, to be vested in Lee Walsky during said period of time. Tax title was, as of December 31, 1941, outstanding in Gray Properties, Inc., a Delaware Corporation.

The following are the only instruments affecting title to said property recorded during said period:

Tax deed from the Commissioners of the District of Columbia to Jennie Faust, dated May 2, 1930 and recorded January 7, 1931 in Liber 6516 at folio 461. Assessed in the name of Bessie A. Brown. Sold for taxes for the year ending June 30, 1925.

Deed from Charles I. Russo, Trustee in Bankruptcy of the Estate of Manuel Faust, a bankrupt, to Gray Properties, Inc., a Delaware Corporation, dated November 1, 1938 and recorded November 16, 1938 in Liber 7289 at folio 69. This Deed re-recorded November 18, 1939 in Liber 7413 at folio 43 for the purpose of correcting acknowledgment.

Property Description

Part of Original Lot numbered Eighteen (18) in Square numbered Seven Hundred Thirty-Four (734) described as follows:

Beginning for the same at a point on the South Line of "D" Street distant 48.17 feet West from the Northeast corner of said Lot and running thence with said line of "D" Street West, 8.0 feet; thence South and parallel with the East line of said Lot to the Southerly line of said Lot; thence northeasterly with said Southerly line to a point due South from the place of beginning; thence North to said line of "D" Street and the place of beginning.

Said property being now known for assessment and taxation purposes as Lot numbered Eight Hundred Forty-Nine (849) in Square numbered Seven Hundred Thirty-Four (734).

Subject to a right of way over the rear 12 feet thereof for the benefit of Original Lot 2 and subdivision Lot "B" in said square.

REALTY TITLE INSURANCE COMPANY, INC.
 By: Robert W. Acker, Asst. Vice Pres.
 Attest: John T. Ogilvy, Asst. Treas.

PLAINTIFFS' EXHIBIT NO. 43

(Recorded August 9, 1963, at 1:04 P.M. in Liber 12048, Folio 143
of the Land Records for the District of Columbia.)

D E E D

(Property Acquired Thru Private Sale)

THIS INDENTURE, made this 30th day of July, in the year
one thousand nine hundred and sixty three by and between Walter N.
Tobriner, John B. Duncan, C. M. Duke, Commissioners of the Dis-
trict of Columbia, in the name of and on behalf of said District,
of the first part, and Tommy C. Ishee and Maryclaire Ishee, of
the second part.

WITNESSETH, THAT WHEREAS the hereinafter described pro-
perty was subject to taxation and assessment and was duly assessed
for certain taxes during the fiscal years listed in the schedule
hereinafter appearing, and the said taxes were duly levied upon
said property, all in the manner prescribed by law;

AND WHEREAS, the said taxes and assessments were not
paid when due and thereupon became in arrears and delinquent and
as provided by law, certain interest, penalties and charges became
due, and the same remaining unpaid the said property was thereafter
advertised and offered at public sale to the highest bidder for
the satisfaction of said taxes and assessments so in arrears and
delinquent together with interest, penalties and charges then due,
and no other person having bid the amount due, the D.C. Treasurer
bid in and purchased the said property for the District of Colum-
bia, the date of each such sale and other information in connect-
ion therewith being set forth in the said schedule hereinafter ap-
pearing, all in accordance with the laws for the government of the
District of Columbia;

AND WHEREAS, the owner or owners of said property, or
their legal representatives, did not within two years from the date
of such sale to the District of Columbia redeem the said property
from the said sale in the manner provided by law;

AND WHEREAS, the parties of the second part have made
application to the Commissioners of the District of Columbia to pur-
chase the said property at private sale pursuant to an Act of Con-
gress entitled "An Act in relation to taxes and tax sales in the

District of Columbia," approved February 28, 1898, as amended, and the said parties of the second part have paid to the D.C. Treasurer the full amount for which said property was bid in and purchased by the District of Columbia at public sale as aforesaid, PDT #205302, to wit, the sum of Three hundred ninety-seven dollars and twenty-nine cents (\$397.29) as shown in the schedule hereinafter appearing;

AND WHEREAS, all other assessments, taxes PDT #205302 due the District of Columbia, as recited in the said schedule hereinafter appearing and amounting to the sum of Sixty-two dollars and thirty-three cents (\$62.33), have been paid to the D.C. Treasurer by the said parties of the second part, as required by law;

SCHEDULE

The property hereinbefore mentioned is located in the District of Columbia and is known for purposes of assessment and taxation as lot numbered 849 in square numbered 734 according to the records in the Property Tax Division, Finance Office of the District of Columbia. Said property is now assessed in the name of Gray Properties, Inc.

The said property was purchased at public sale by the D.C. Treasurer for and in the name of the District of Columbia as follows:

Fiscal year for which taxes and assessments and charges, as indicated, were levied	Date of Sale	Amount for which property was bid in by the District of Columbia	Interest thereon	Amount due D.C. including interest to date
1930 2nd half	1/13/31	\$ 4.90	See PDT # 205302	\$ 4.90 11.05
1931	1/19/32	11.05		11.05
1932	1/17/33	11.05		11.05
1933	1/16/34	11.05		11.05
1934	1/15/35	9.81	"	9.81
1935	1/14/36	9.81	"	9.81
1936	1/19/37	9.81	"	9.81
1937	1/18/38	9.81	"	9.81
1938	1/17/39	11.30	"	11.30
1939	1/16/40	11.35	"	11.35
1940	1/14/41	11.35	"	11.35
1941	1/13/42	11.35	"	11.35
1942	1/19/43	11.35	"	11.35
1943	1/18/44	11.35	"	11.35
1944 & 1945	1/18/46	23.60	"	23.60
1946	1/17/47	11.60	"	11.60
1947	1/16/48	11.60	"	11.60
1948	1/19/49	13.16	"	13.16
1949	1/20/50	13.16	"	13.16

(Deed, Commissioners of D.C. to Tommy C. Ishee et ux. - cont.)

Fiscal year for which taxes and assessments and charges, as indicated, were levied	Date of Sale	Amount for which property was bid in by thereon	Interest	Amount due D.C. including interest to date
1950	1/19/51	\$14.08	See	\$ 14.08
1951	1/18/52	14.18	PDT	14.18
1952	1/16/53	14.13	#	14.13
1953	1/22/54	14.18	205302	14.18
1955	1/13/55	14.28	"	14.28
1956	1/11/57	14.80	"	14.80
1957	1/17/58	15.56	"	15.56
1958	1/16/59	15.56	"	15.56
1959	1/15/60	15.56	"	15.56
1960	1/13/61	31.85	"	31.85

Amount due, on sales unredeemed within two years of sale- \$397.29

All other assessments, taxes, costs and charges due the District of Columbia, including public sales to the District of Columbia within two years and unredeemed:

Fiscal year for which taxes and assessments and charges, as indicated, were levied	Date of Sale	Amount for which property was bid in by thereon	Interest	Amount due D.C. including interest to date
1961	1/12/62	\$31.95	See	\$ 31.95
1963	Not sold	29.40	PDT 205302 .98	459.62 36.55 496.17

Amount of all other assessments, taxes, costs and charges due D.C. - - - - - \$ 62.33
Total amount due the District of Columbia - - - - - 459.62
Surplus over statutory minimum price for deed - - - 36.55
Total amount paid by applicant for deed 496.17

NOW, THEREFORE THIS INDENTURE WITNESSETH, that said parties of the first part, by virtue of the authority conferred on them by said Acts and laws and for and in consideration of said sum of Four hundred ninety-six and 17/100 dollars (\$496.17), the receipt of which is hereby acknowledged, have granted, bargained, sold and

conveyed, and by these presents do grant, bargain, sell and convey in the name of and on behalf of said District of Columbia unto the said parties of the second part, its successors, heirs and assigns, the hereinbefore described lands and premises, and the appurtenances thereunto belonging or in any wise appertaining; to have and to hold the same unto the said parties of the second part, its successors, heirs and assigns forever.

IN WITNESS WHEREOF, the said Walter N. Tobriner, John B. Duncan, C. M. Duke constituting the Board of Commissioners of the District of Columbia, parties of the first part, having first considered and approved the foregoing deed sitting as a board, have directed the execution thereof in the name of said Board of Commissioners by their Secretary, who has hereunto set his hand affixed the seal of the District of Columbia hereto, under authority of the Act of Congress entitled "An Act to relieve the Commissioners of the District of Columbia of certain ministerial duties," approved February 11, 1932, on the day and year first hereinbefore written.

BOARD OF COMMISSIONERS OF
THE DISTRICT OF COLUMBIA

By /s/ J.M. Thorne (Seal)
Secretary

Signed, sealed and delivered in the presence of -
/s/ Dorothy S. Busch

DISTRICT OF COLUMBIA, ss:

I, Lettie L. Leizer, a Notary Public in and for the District of Columbia, DO HEREBY CERTIFY that G. M. Thorne, Secretary of the Board of Commissioners of the District of Columbia, parties to the foregoing and annexed deed bearing date on the 30th day of July, A.D. 1963, personally appeared before me in said District, the said G. M. Thorne being personally well known to me as the person who executed the said deed and acknowledged the same to be the act and deed of the said Board of Commissioners of the District of Columbia.

Given under my hand and official seal this 30th day of July, A.D. 1963.

/s/ Lettie L. Leizer
Notary Public, D.C.

PLAINTIFFS' EXHIBIT NO. 44

DEED, dated February 20, 1958 and recorded February 26, 1958 in Liber 11001, folio 387 of the Land Records for the District of Columbia.

Winifred M. Johnson et al., Grantors
Lowell K. Bridwell, Grantee

Description

Lot numbered Fifty-Six (56) in James D. Burn's subdivision of parts of original Lots numbered Seventeen (17) and Eighteen (18) in Square numbered Seven Hundred Thirty-Four (734), as per plat recorded in Liber 39 at folio 7 in the Records of the Office of the Surveyor for the District of Columbia, except the rear 10.31 feet of said lot condemned for alley by D.C.C. #884 in the Supreme Court for the District of Columbia.

NOTE: At the date hereof the above described land is designated on the Records of the Assessor for the District of Columbia for assessment and taxation purposes as Lot numbered Eight Hundred Forty-Four (844) in Square numbered Seven Hundred Thirty-Four (734).

PLAINTIFFS' EXHIBIT NO. 47

James C. Wilkes	Law Offices	Maryland Associate
James E. Artis	WILKES & ARTIS	William A. Linthicum,
G. Reber Littlehales	Tower Building	Jefferson Building
Norman M. Glasgow	Washington 5, D.C.	Rockville, Maryland
Harvey M. Holland, Jr.	National 8-0060	Garden 4-4610
Louis H. Mann		
J. Hampton Baumgartner, Jr.		
Ellis N. Black		CERTIFIED MAIL
James C. Wilkes, Jr.		
Charles L. Wilkes		
Allen Jones, Jr.		September 24, 1962

Mr. and Mrs. Tommy C. Ishee
149 D Street, S.E.
Washington, D.C.

Re: Right-of-way over the rear of lot improved
by premises 149 D Street, S.E.

Dear Mr. and Mrs. Ishee:

This is to advise you that this firm has been retained by the owners of all property abutting this right-of-way over the rear of your lot improved by premises 149 D Street, S.E.

Demand is hereby made that you remove the obstructions to said right-of-way recently erected by you on or before September 28, 1962.

This firm has been instructed to take the necessary steps to eliminate said unlawful obstructions and to compensate our clients for the damages resulting from your unlawful erection of said obstructions in the event that you do not comply with this demand.

JCWJr; emd

cc: Dorothy Breuninger Grigsby
Julia D. Connor & Mary Connor
Ann Schreiber
Maurine T. Horton
Edward Gruis

Very truly yours,

/s/ James C. Wilkes, Jr.
James C. Wilkes, Jr.

DEFENDANTS' EXHIBIT NO. 11

149 D Street, S.E.
Washington, D.C.

December 6, 1960

Mr. Edward G. Brudie
326 Second Street, S.E.
Washington 3, D.C.

Dear Ed:

After serious consideration I have decided to decline your invitation to participate with you and your group in the acquisition of the Folger Apartments.

One point I might make in passing is that contrary to the statement in your prospectus, the Folger does not have access to the alley in the rear. The public alley ends on the west side of my property, and the current use of the back of my lot for trash removal from the Folger Apartments is a permissive use.

I wish you the best in your venture. If I can be of any assistance whatever, please call on me.

Sincerely,

/s/ Tommy C. Ishee

DEFENDANTS' EXHIBIT NO. 12

Edward G. Gruis
Attorney at Law
326 Second Street, S.E.
Washington 3, D.C.
Lincoln 4-7320

November 30, 1960

Tommy C. Ishee
149 D Street, S.E.
Washington 3, D.C.

Re: Folger Apartment Associates

Dear Tom:

Following up our earlier conversations on creating a syndicate for the purchase of the Folger Apartment, the date for settlement under the Purchase Agreement is not too far off. It is therefore essential to start putting this transaction together.

A meeting will be held at my home on Sunday, December 4, 1960, at 2:15 p.m. to work out some of the formal aspects of the Joint Venture and to set a date for its consummation.

Present prospects now show, if you can be counted on, the Venture to be 3/4's complete (or subscribed to) and tentative takers for the remaining two shares. The tentative takers, however, cannot definitely be counted on; therefore, should you have another interested or compatible person, or prospect, bring him or her along. I would hate for this deal to fall through now because of the shortage of one person.

Meanwhile, I have gone ahead with checking on the condition of the building through the appropriate D.C. Housing and other government agencies and will make a report at the meeting.

I hope to see you on December 4th then.

Sincerely,

/s/ Ed

Ed. Gruis

DEFENDANTS' EXHIBIT NO. 13

EDWARD G. GRUIS
ATTORNEY AT LAW
326 Second Street, S. E.
Washington 3, D.C.
Lincoln 4-7320

November 2, 1960

Mr. Tommey C. Ishee
149 D Street, S.E.
Washington 3, D.C.

Dear Mr. Ishee:

On October 24, 1960, the writer completed negotiations for the possible purchase of the Folger Apartment Building at 409-411 Second Street, S.E. This was done in the belief that responsible and nearby property owners, like myself, would be interested in removing the blight which this building in its present condition has caused our neighborhood. In addition to enhancing the value and charm of our respective homes by upgrading this building, the purchase of this property also demonstrates a genuine faith in the development of the Capitol Hill area and represents a potentially attractive real estate investment.

It is my intention to form a joint venture among people like yourself to acquire and remodel this building. At this stage eight-one-eighth shares at about \$5,000 a piece will be required to undertake and complete this transaction. The negotiations and settlement are being handled through the real estate office of C. Millicent Chatel & Joseph M. Wise, Inc., which has also expressed an interest in handling the property management and a willingness to assist the joint venture to upgrade and remodel this property.

I have been advised by Mrs. E. Krizek of your interest and possible willingness to participate with me in this venture. Currently, a detailed statement of the building's present status and the terms of the transaction and the mechanics for forming a joint venture are being prepared. With these materials in hand, I hope then to invite you to a meeting where we can discuss this project in detail and consider your possible participation in this very worthwhile venture.

Sincerely yours,

/s/ Edward G. Gruis

Edward G. Gruis

DEFENDANTS' EXHIBIT NO. 20

149 D Street, S.E.
Washington 3, D.C.
December 1, 1962

Mr. Edward Gruis
325 Second Street, Southeast
Washington, D.C.

Dear Mr. Gruis:

I am addressing this letter to you as representative of the owners of the Folger apartment house at 411 Second Street, S.E., Washington, D.C.

Because of the breakdown in negotiations between our respective attorneys, Messrs. Wagman and Wilkes, in the matter of the gates bounding the rear of my property, I am hereby rescinding your permission to pass over the rear twelve feet of my property.

You and the other owners of said Folger apartment house, your tenants, agents, contractors, and workmen, are hereby instructed and directed to make no further use of said twelve-foot strip of land along the rear of my property, either as a passageway or otherwise, until further notice from me.

Very truly yours,

/s/ Tommy C. Ishoe

DEFENDANTS' EXHIBIT NO. 18Building Permit Receipt

Date 3/14/57 (Type) fence
 Address of work: 149 D St., S.E.

RECEIPT No: B 21145848 734TOMMY C. ISHEE

Total permit fee

When stamped "PAID" by the D.C. Treasurer, Filing fee
 this coupon will become your receipt and No. Date
 when presented to the Permit Clerk will FEE PAYABLE \$ 3.00
 entitle you to your permit.

ERECT BOARD FENCE 7' HIGH ENTIRELY UPON THE LAND OF OWNER

Not selected

Deposit No. Amount \$
 Dept. of Licenses & Inspections
 Govt. of Dist. of Col.

Chief, Permit Branch
 By /s/ Wm. A. Robinson
 Permit Clerk

DEFENDANTS' EXHIBIT NO. 35Building PermitDate: 11-29-63 (Type) Duplication of PERMIT NO.Address of work: 149 D St. S.E. #2581

Lot (845) Square (734)

Permission is hereby granted to

Total Permit Fee \$

LEE WALSKY

Filing Fee \$

who is authorized to perform the work
 described herein at the address shown
 above in strict accordance with the
 conditions stated on BOTH sides of
 this permit.

No. Date

FEE PAYABLE \$ 2.00Authorized work and conditions of per-
 formance thereof:

RUPLICATE OF PERMIT # 2581
 CONSTRUCT WOOD FENCE 8' HIGH,

ON ALLEY LINE

Builder: Present Owner - Ishee, Tommy

Value \$ No. of Bldgs.

Width of Bldgs. Length

Height No. of Stories

Use Dist. Area Dist.

To be occupied as

Height of terrace above grade

Projections:

Address of owner:

SUPERINTENDENT OF PERMITS

Deposit No. Amount \$

By /s/ Doris Butler

Permit Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JULIA D. CONNOR, et al.	:
Plaintiffs	:
vs.	:
TOMMY C. ISHEE and MARY	:
CLAIRE ISHEE	:
Defendants	:

C.A. No. 616-63

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come on for final hearing on the merits of the complaint and counterclaim; and the defendants-counterclaimants and the plaintiff-counterdefendant, Edward G. Gruis, having stipulated that the demand for a jury trial which pertained solely to the counterclaim be withdrawn; and the court having granted motion of plaintiff-counterdefendant for judgment on the opening statement of the defendants-counterclaimants with respect to paragraph 3 of the counterclaim pertaining to a tree; and the court having permitted defendants to deny the validity of deed creating a right of way over the rear 12 feet of defendants' Lot 848 in Square 734 notwithstanding the admission of the validity thereof contained in defendants' answer to the complaint; and the court having permitted plaintiffs to amend their complaint by reason of defendants' acquisition of Lot 849 in Square 734 during the pendency of this suit so as to claim a right of way over the rear 12 feet of said Lot 849 by the same deed which purported to create the right of way over defendants' Lot 848, or in the alternative, to claim said rights of way by adverse possession; and plaintiffs having waived all compensatory damages with the understanding that the demand in plaintiffs' complaint for attorney's fees was not waived; and the Court having fully heard all of the evidence on the complaint and on paragraphs 1 and 2 of the counterclaim;

NOW, THEREFORE, the court, this 9th day of March 1964, does hereby make the following findings of fact and conclusions of law:

FINDINGS OF FACT ON COMPLAINT

1. On March 20, 1860, Daniel Allman, Sr., grandfather of plaintiffs, Julia D. and Mary Connor, and great uncle of plaintiff, Dorothy Breuninger Grigsby, acquired title to Lots 64, 65 and 66 in Square 734, now owned by the plaintiffs Connor, Connor and Schreiber. Be-

fore Allman's death on September 9, 1915, he additionally acquired Lot B in said square, now owned by the plaintiff, Horton, and all of original Lot 18 in Square 734 except the west 8 feet front by the depth thereof, now known for purposes of assessment and taxation as Lots 848 and 849 in said square, and now owned by the defendants and hereinafter referred to as defendants' land. By deed dated January 10, 1919, Trustees, Daniel Allman, Jr. and Margaret Connor, appointed by this court in Equity Case No. 34055, sold and conveyed defendants' land to Marie Duff (plaintiff's Exhibit 2) and retained a right of way over the rear 12 feet thereof for the benefit of Lot B and Original Lot 2 (now Lots 64, 65, 66, and 800) in said square. Said lot 800, now owned by plaintiff, Grigsby, was not then a part of the Estate of Daniel Allman, Sr., but was then owned and occupied by plaintiff, Grigsby's parents, Arthur and Julia Breuninger, who were related to Daniel Allman, Sr. and all of the beneficiaries of the trust. The reservation of said right of way over defendants' land for the benefit of said original Lot 2 and Lot B was in said Equity Case No. 34055 suggested by the real estate experts as prudent because it constituted an extension eastward from a public alley theretofore condemned from First Street eastward to the west line of defendants' land, recommended to this court by the Trustees in said proceeding, consented to by all beneficiaries, and ratified by this court. Each subsequent conveyance of defendants' land was made subject to said right of way.

2. On July 25, 1924, garages were completed at the rear of Lots 800, 66 and 65, facing said right of way, and at the same time paving the right of way over the rear 12 feet of defendants' land was completed. At that time William H. McCray, who had acquired Lot 46 in said square on July 5, 1903, and had constructed thereon an apartment building known as the "Folger Apartments", together with a fence at the rear thereof, which said McCray occupied said Folger Apartments in part as his home, together with his daughter who was the best friend of plaintiff Grigsby, rented the new garage located at the rear of Lot 800 and without the consent of Lee Walsky, then the owner of defendants' land, made an opening in his said rear fence onto said right of way as a means of ingress to and egress from said garage and the public alley and said Folger Apartments

located upon said Lot 46, and continuously and openly used said right of way for such purpose until he sold and conveyed the Folger Apartments to David Bernstein et ux on October 14, 1957, whereupon such use of said right of way over defendants' land for the benefit of the Folger Apartments located upon Lot 46, without the consent of Lee Walsky, then still the owner of defendants' land, was enlarged to include general alley purposes, including, but not limited to, tenant ingress and egress to and from the public alley, trash collection, garbage collection, and as a rear service entrance to the Folger Apartments. Defendants' land was acquired by Lydia Meaders on August 3, 1945, who occupied the premises as her home. At the time of her purchase, Lydia Meaders observed that the right of way was used for general alley purposes for the benefit of all property of all plaintiffs; such use continued openly and to her knowledge but without her consent, during her entire period of ownership. Tillie Chidakel acquired the Folger Apartments on October 31, 1947 during the ownership of defendants' land by Meaders, and upon acquisition, observed that the said right of way over the rear 12 feet of defendants' land had been used for general alley purposes and continued to openly use the same for general alley purposes during the entire period of her ownership. Defendants acquired title to Lot 848 in said square on November 30, 1951 from Meaders, during the ownership of the Folger Apartments by Chidakel. Chidakel never sought or obtained permission from either Meaders or defendants to make such use of said right of way over defendants' land. Reed Liggit acquired title to the Folger Apartments from Chidakel on September 14, 1956 and retained it until February 6, 1961, during which time the use of the right of way for general alley purposes for the benefit of the Folger Apartments continued, without the consent of defendants. Defendants admitted that they had no conversation with Liggit concerning use of the right of way. Although Defendants acquired title to Lot 848 on November 30, 1951, they rented it as a tenement until they moved into the premises in 1957. When defendants purchased Lot 858 there was a fence running in an east-west direction, across their back yard, north of the right of way, which had been erected in 1927. After their purchase of Lot

848, defendants removed said fence and constructed a new east-west fence across their back yard, north of the right of way. On December 6, 1960 defendants mailed to plaintiff Gruis, at a time when he was not yet owner of the Folger Apartments, letter stating that the use of the right of way was permissive. This was the sole evidence presented at the hearing respecting consent given to any plaintiff to use the subject right of way over defendants' land. However, 15 years of continuous use of the right of way from the date of the erection of the garages and McCray's use from July 25, 1924 had already expired on July 25, 1939; and, even disregarding that, the fact is that 13 years of continuous use of the right of way from the date Meaders took title to defendants' land on August 3, 1945 had already expired on August 3, 1960, over 4 months before defendants' letter to plaintiff Gruis. No owner of defendants' land ever gave consent to any owner of Lots 800, 66, 65, 64 or B to the use of the rear 12 feet of defendants' land for general alley purposes, including but not limited to, ingress and egress to and from the public alley, trash collection, garbage collection, and as a rear service entrance, which was continuously made from July 25, 1924 through July, 1962. Defendants acquired title to Lot 849 by deed dated July 30, 1963, from the Commissioners of the District of Columbia at private sale pursuant to an Act of Congress entitled "An Act in Relation to Taxes and Tax Sales in the District of Columbia", approved February 28, 1898, as amended (Title 47, D.C. Code, 1961 Edition, Section 47-1001 et seq.) From January 1, 1924 through December 31, 1941 record title to said Lot 849 was vested in Lee Walsky. Tax title thereto was, as of December 31, 1941, outstanding in Gray Properties, Inc., a Delaware corporation. From January 1, 1924 to date fee simple title to Lot 849 was never vested in the District of Columbia.

3. In August 1962, defendants willfully, and unlawfully and with utter disregard of the established rights of all plaintiffs, caused to be erected barricades, consisting of wooden posts and fencing, which defendants characterize as "gates", but which were constructed primarily of heavy oak, in sections eight feet in length and four feet in height, along the west end of the right of way near the public alley and along the south line of the right of

way in front of the garages located on Lots 800, 66 and 65, and thereafter almost daily parked a car in the subject right of way, planted trees or shrubs in the right of way, and thereafter on May 16, 1963 erected a chicken wire barricade across the opening in the rear fence of the Folger Apartments, all with the intent and purpose of impeding, obstructing and otherwise interfering with the use by plaintiffs of the subject right of way for general alley purposes, and which in fact constituted an unreasonable obstruction of plaintiffs' use of said right of way for general alley purposes, and which obstructions continued until the same were removed pursuant to Temporary Restraining Order issued by this court on May 20, 1963, on the application of plaintiffs nine months after the erection of such obstructions, who had, through counsel, demanded that the same be removed by certified letter to defendants dated September 24, 1962.

FINDINGS OF FACT ON COUNTERCLAIM

1. William H. McCray on June 5, 1903, acquired title to Lot 46 in Square 734. On May 12, 1905 he constructed an apartment building thereon known as the Folger Apartments, numbered 409-411 Second Street, S.E., Washington, D.C., including a fence at the rear thereof, which fence ran from north to south parallel to but one foot west of the rear or west property line of said Lot 46 and was connected to fences also constructed by McCray along the north and south lines of said Lot 46, to the end that said fencing enclosed the rear yard of the Folger Apartments together with part of the defendants' land without the consent of defendants or their predecessors in title. Said fence remained so located and without consent of the owners of defendants' land until the plaintiff-counterdefendant Gruis removed the same after having received written notice from the District of Columbia Department of Licenses and Inspections to repair or remove the said fence, which was in dilapidated condition, in December 1962. Gruis thereafter replaced the old dilapidated McCray fence with a new cedar screen fence, which he caused to be erected on or about his deed line at the rear of the Folger Apartments, namely, not further west into the defendants' land than McCray had erected the old fence, but rather, farther east toward his apartment building. The parties

each submitted surveys which appear to conflict. The defendant-
counterclaimants' survey appears to show that the new Gruis fence
extends at points slightly westward of the west line of Lot 46.
The new fence is clearly east of the old fence at all points and
is approximately on the deed line to Lot 46.

CONCLUSIONS OF LAW ON COMPLAINT

1. Actual, continuous, adverse, open and notorious use for a period of 15 years created an easement appurtenant to the properties of all plaintiffs, namely, Lots 46, Original Lot 2 (now known as Lots 64, 65, 66 and 800) and Lot B in Square 734 as the dominant estate, by prescription, over the rear 12 feet of Lots now known for purposes of assessment and taxation as Lots 848 and 849, (being all of Original Lot 18 in Square 734 except the west 8 feet front by the depth thereof) as the servient estate, for general alley purposes which shall forever remain open and unobstructed in any manner whatsoever, and shall run with the land in perpetuity, and with the right but not the obligation, of the owners of the dominant estate, or any of them, to from time to time pave or otherwise surface the same.

2. In view of the conclusion of law set forth in paragraph 1 above, the issue of the validity of the deed creating the right of way is moot.

3. Plaintiffs have been irreparably injured by defendants intentionally willful and unlawful actions performed with utter disregard to the established rights of plaintiffs who are entitled to a permanent injunction against defendants and their agents, servants, employees and attorneys and those persons in active participation with them who receive actual notice of the permanent injunction by personal service or otherwise, requiring them to remove the shrubs or trees planted in the subject easement area by them and restraining and enjoining them permanently from erecting any post, fence, fencing, or gate, or any other obstruction or impediment, or in any manner or degree interfering with use of the subject easement.

CONCLUSIONS OF LAW ON COUNTERCLAIM

1. Actual, continuous, adverse, open, notorious and exclusive possession of an area of defendants' Lot 848 in Square 734 between

extensions of the north and south lines of plaintiff Gruis' Lot 46 westward to a line parallel to and one foot to the west of the west line of said Lot 46 in Square 734 for a period of 15 years, conferred title thereto upon the ownership of said Lot 46 in fee simple by adverse possession.

2. The fence removed by plaintiff-counterdefendant Gruis and the land thereunder and to the east thereof belonged to him; he had an absolute right to remove the same; defendants-counterclaimants are therefore entitled to no damages whatsoever for the removal thereof, and the counterclaim pertaining thereto should be dismissed.

/s/ Burnita Shelton Matthews
JUDGE

Presented by:

/s/ James C. Wilkes, Jr.
Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JULIA D. CONNOR, et al.,	:
Plaintiffs	
vs.	: C.A. No. 616-63
TOMMY C. ISHEE and MARY	:
CLAIRE ISHEE	
Defendants	:

JUDGMENT FOR PLAINTIFFS PERFECTING TITLE
ESTABLISHED BY ADVERSE POSSESSION, DISMISSING
COUNTERCLAIMS, AND GRANTING PERMANENT IN-
JUNCTION AGAINST DEFENDANTS

This matter having come on for final hearing and having been heard by the Court, without a jury, and the Court having made findings of fact and conclusions of law,

NOW, THEREFORE, it is by the Court this 9th day of March, 1964,
ADJUDGED, ORDERED AND DECREED:

1. That title has vested in all plaintiffs by adverse possession to an easement appurtenant to the properties of all plaintiffs, namely, Lot 26, original Lot 2 (now known for purposes of assessment and taxation as Lot 800, and also Lots 64, 65 and 66) and Lot B in Square 734 in the District of Columbia, as the dominant

estate, over the rear twelve (12) feet of Lots now known for purposes of assessment and taxation as Lots 848 and 849 in Square 734 (being all of original Lot 18 in Square 734 except the west eight (8) feet front by the depth thereof), in the District of Columbia, as the servient estate, for general alley purposes which shall forever remain open, and unobstructed in any manner whatsoever, which easement shall run with the land in perpetuity, and with the right but not the obligation of the owners of the dominant estate, or any of them, to from time to time pave or otherwise surface the same; and such title is hereby perfected.

2. That the preliminary injunction heretofore entered in this cause be and the same is hereby dissolved and liability under the bonds for both the temporary restraining order and the preliminary injunction is hereby terminated and the sureties thereunder are hereby released.

3. That defendants (and their agents, servants, employees and attorneys and those persons in active participation with them who receive actual notice of this permanent injunction by personal service or otherwise) are hereby permanently enjoined and restrained from erecting any post, fence, fencing, or gate, or any other obstruction or impediment, or in any manner or degree interfering with use of the aforesaid easement and are hereby ordered to forthwith remove the shrubs or trees planted in the aforesaid easement area by defendants.

4. That title has vested in the plaintiff Edward G. Gruis, in fee simple, by adverse possession to a part of original Lot 18 in Square 734 in the District of Columbia described as follows:

"Commencing at the Southeast corner of Original Lot 18 in Square 734, and thence North along the East line of said Original Lot 18 a distance of twenty-five (25) feet to the North line of Lot 46 in Square 734, thence West a distance of one (1) foot, thence South along a line parallel with the East line of said Original Lot 18 to the South line thereof, thence Eastwardly along the South line of said Original Lot 18 to the point of beginning;" and such title is hereby perfected.

5. That defendants' counterclaims be and the same hereby are dismissed.

6. That all plaintiffs be and hereby are awarded a judgment for costs against the defendants.

/s/ Burnita Shelton Matthews
JUDGE

Presented by:

/s/ James C. Wilkes, Jr.
Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIA D. CONNOR, et al., :
Plaintiffs :
vs. : Civil No. 616-63
TOMMY C. ISHEE and MARY CLAIRE ISHEE, :
Defendants :
:

NOTICE OF APPEAL

Notice is hereby given this 6th day of April 1964, that
TOMMY C. ISHEE and MARY CLAIRE ISHEE, Defendants, hereby appeal
to the United States Court of Appeals for the District of Col-
umbia from the judgment of this Court entered on the 9th day of
March, 1964 in favor of JULIA D. CONNOR, et al., Plaintiffs,
against said TOMMY C. ISHEE and MARY CLAIRE ISHEE, Defendants.

/s/ Tommy C. Ishee, Defendant
Pro Se

Copy to:
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Wilkes & Artis
Tower Building
Washington, D.C.
Attorney for Plaintiffs

/s/ Maryclaire Ishee, Defen-
dant Pro Se

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Washington, D.C.
Attorney for Defendants

IN THE UNITED STATES COURT FOR THE DISTRICT OF COLUMBIA

JULIA CONNOR, et al., :
Plaintiffs :
v. : Civil Action No. 616-63
TOMMY ISHEE and MARY CLAIRE ISHEE, :
Defendants :
:

STATEMENT OF POINTS

The points upon which Appellants intend to rely on the Appeal in this case are as follows:

1. The District Court erred in not dismissing Plaintiffs' Complaint upon their failure to show a complaint.

2. The District Court erred in not finding that title to Lot 849 was vested in the District of Columbia for a period sufficient to prevent the vesting of title by prescription to an easement over the rear 12 feet of Defendants' Lot 849 in any of the Plaintiffs herein.

3. The District Court erred therefor in ruling the issue of the validity of the deed creating the right of way moot; in not finding that said right of way constituted an invalid easement, or an easement in gross and not an easement appurtenant.

4. The District Court erred in not finding that the tax deed by which Defendants obtained title to Lot 849 extinguished said easement in gross.

5. The District Court erred in finding that user of the 12 foot strip of land over the rear of Defendants' Lots 848 and 849 had been "actual, continuous, adverse, open and notorious" for a period of 15 years so as to create an easement appurtenant to the properties of all Plaintiffs, in that such finding was contrary to the evidence and the law.

6. The District Court erred in finding as a Conclusion of Law on the Counterclaim that the fence removed by plaintiff-counter-defendant Gruis and the land thereunder belonged to him in that said fence when built was annexed to the realty of Lot 848 and thus belonged to the owners of Lot 848, their successors, heirs, and assigns.

(Statement of Points - cont.)

7. The District Court erred as a Conclusion of Law on the Counterclaim in finding that title by adverse possession had vested in Plaintiff Gruis, owner of Lot 46, to a one foot strip of Defendants' Lot 848 in that such finding was contrary to the evidence and the law.

8. The District Court erred in finding that plaintiffs had been irreparably injured by defendants' action in erecting driveway gates along the boundaries of the 12 foot right of way claimed by plaintiffs in that such finding was contrary to the evidence and the law.

9. The District Court erred in finding as a Conclusion of Law on the Counterclaim that Defendants were entitled to no damages whatsoever for the removal of said fence by Plaintiff Gruis, and in dismissing the counterclaim pertaining thereto.

/s/ Tommy C. Ishee, Defendant
Pro Se

/s/ Maryclaire Ishee, Defendant
Pro Se

United States Court of Appeals
for the District of Columbia Circuit

FILED NOV 10 1964

BRIEF FOR APPELLANT

Nathan J. Paulson
CLERK

United States Court of Appeals

For The District of Columbia Circuit

No. 18,740

TOMMY C. ISHEE, et al.,

Appellants

v.

JULIA D. CONNOR, et al.,

Appellees

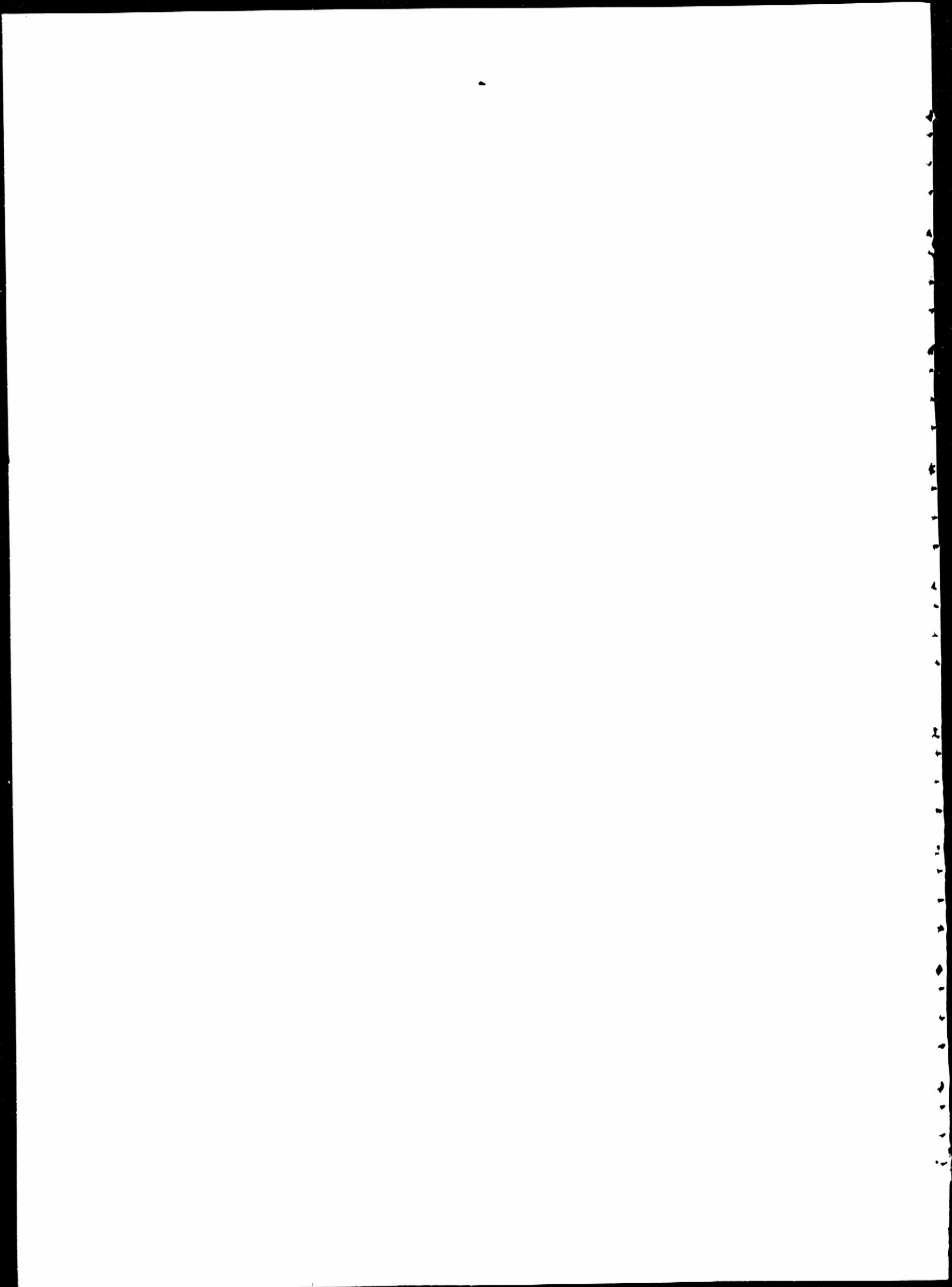
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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TOMMY C. ISHEE

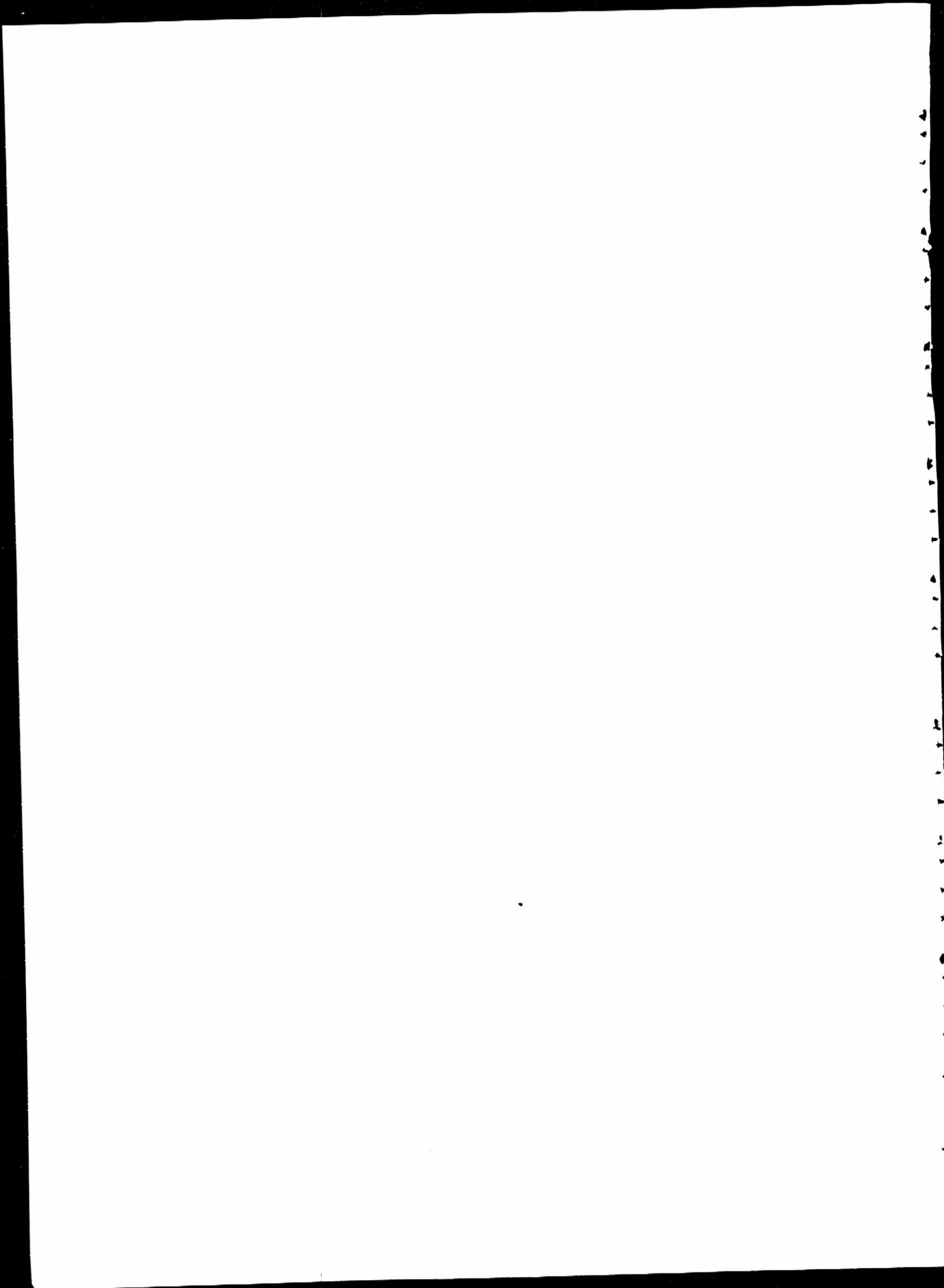
MARYCLAIRE A. ISHEE

Appellants Pro Se



STATEMENT OF QUESTIONS PRESENTED

1. Is the erection of gates along a right of way that has been used in conjunction with other land as part of a roadway, unlawful if the gates do not materially interfere with use of the right of way, are no greater inconvenience to dominant than to servient owners, and are a necessary protection to the servient property?
2. Can an adverse claim intervene against a property during the period between the placing of a tax lien on the property by the District of Columbia and the conveyance of the property by the District of Columbia by tax deed?
3. Does a tax deed in the District of Columbia extinguish an adverse claim, an easement in gross, and an easement appurtenant if the property conveyed by tax deed was assessed and taxed as a full and unencumbered estate, not believed to be servient to any easement?
4. When a servient owner of a right of way who is not obligated by grant to do so, leaves his land open to be used as part of a wider roadway, and participates in paving and fencing the wider roadway which is thereafter used as a single unit by himself and others, should his action be construed as constituting permission to use of his land?
5. Is it error for the District Court to vest title to an easement by prescription, while failing to find that user had been neither exclusive or hostile?
6. Is it error for the District Court to fail to rule on the validity of a challenged right of way by grant by ruling that the dominant tenements of the right of way had acquired an easement by prescription to the right of way?
7. When a shade tree stands along a true boundary line, and a fence is accordingly built one foot beyond the true line, and the property owners are friendly, is use of the one foot of land by the non-owner adverse or impliedly permissive?
8. When a fence is built upon the land of another, does it belong to the owner of the soil to which it is affixed, in the absence of any contrary agreement or showing of exclusive dominion by other than the owner of the soil?



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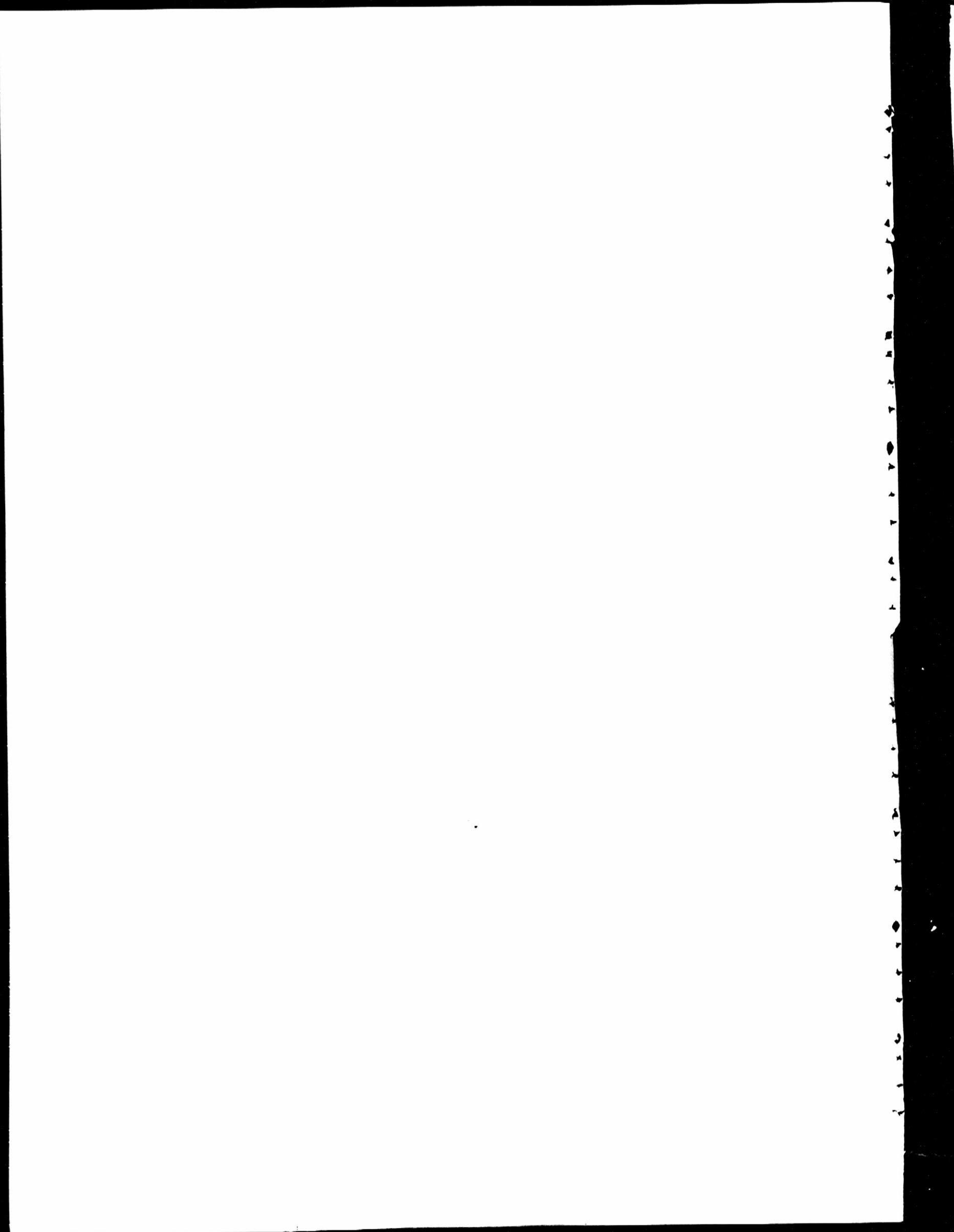
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Cases chiefly relied on are marked by asterisks



UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,740

TOMMY C. ISHEE, et al.,
Appellants

v.
JULIA D. CONNOR, et al.,
Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

The six Appellees herein sued in the United States District Court seeking the removal of unlocked driveway gates which Appellants had erected along part of the boundaries of Appellants' property, said gates enclosing a 12-foot wide right of way used for many years in conjunction with a portion of Appellees' land as a private roadway, open to a public alley. Five Appellees claimed as dominant tenements of the right of way, created by reservation in a 1919 conveyance of Appellants' land. The validity of this reservation was challenged by Appellants as part of this suit. The

sixth Appellee sought as part of the suit to quiet title to a prescriptive easement claimed by adverse user. All Appellees sought \$25,000 damages and claimed irreparable injury, alleging that the gates deprived them of rear alley access to their properties.

To this complaint Appellants answered, denying all charges, and filed a counterclaim for \$20,000 against adverse claimant Gruis for his arbitrary removal of a fence built on and affixed to Appellants' soil, exposing their minor children to dangerous conditions. Appellants also sought \$5,000 damage for injury to their home caused by a tree standing on Gruis' land against the true boundary line of the respective properties.

During pendency of the suit, Appellees obtained a Temporary Restraining Order from the District Court, permitting them to remove the gates. Also during pendency of the suit, Appellants obtained title by tax deed from the District of Columbia to an adjoining lot, 849.

At the trial of the case, jury trial on the counter-claim was waived by Appellants; monetary damages were waived by Appellees; Appellants were permitted to challenge the validity of the right of way; Appellees were permitted to amend their complaint to include an adverse claim to an easement over Lot 849. The trial was before the Court without a jury, and judgment was for the Appellees.

The judgment of the District Court perpetuates an inequity in which Appellants, as owners of a portion of a roadway, are prevented by Court Order from having any control whatsoever over the land owned by them, but in which they remain legally liable for said land. To this judgment in favor of Appellees, Appellants appeal.

This Court has jurisdiction of the appeal under Title 28 of the United States Code, Section 1291. It is believed that

this Court has jurisdiction to proceed to a consideration and disposition of the case, including the question of the validity of the right of way, on its merits, under Title 28 of the United States Code, Section 2106.

STATEMENT OF THE CASE

Appellants and Appellees are owners of properties which adjoin along their rear boundaries in Square 734 in the District of Columbia. Appellants own Lot 848, premises 149 D Street, S.E., and adjoining Lot 849, which they acquired by tax deed during pendency of this case. Appellees Horton, Schreiber, Julia and Mary Connor and Grigsby own row-house properties known as premises 176, 174, 172, 170 and 160 North Carolina Avenue, S.E., respectively, Lots B, 64, 65, 66 and 800. Appellee Gruis owns the Folger Apartment, premises 409-411 Second Street, S.E., Lot 46. All properties involved in this case front on public thoroughfares in the District of Columbia. (J.A. 1)

Since about July 25, 1924, a roadway, about 60 feet long and 20-22 feet wide, open to and appearing to be part of a public alley with which it merges imperceptibly at its western terminus, has lain astride and along the rear boundary between Appellants' D Street property and Appellees' North Carolina Avenue properties. The roadway comes to a dead end on the east at the rear fenceline of the Folger Apartment. (Defendants' Exhibit No. 1)

Some 12 feet of the width of the roadway is owned by Appellants Ishee and is hereinafter designated as the 12-foot right of way, being the right of way reserved for the benefit of the North Carolina Avenue properties under a 1919 conveyance of the D Street property. The remaining 8 to 10 feet of the width of the roadway is owned by North Carolina Avenue properties, Lots 64, 65, 66 and 800, being formed of contiguous strips of land across the rear of these properties. This portion of the roadway is herein

designated as the south portion. The passageway formed by the right of way and the south portion, as a unit, is referred to as the roadway, to distinguish it from the public alley which it adjoins.

Since 1924, when the roadway, including the 12 foot right of way, was first opened to use, it has been used as a single unit by Appellants, Appellees, and the general public, as if it were in fact, as it appeared to be, a part of the public alley. (J.A. 71, 85, 99, 122). The Complaint in this case, and the judgment of the District Court, referred only to the right of way portion of this roadway.

In 1961, Appellee Schreiber herein, who had then acquired premises 174 North Carolina Avenue, S.E. (Lot 64), removed the old fence at the rear of this property and built a new fence along and slightly over the true boundary line between her Lot 64 and Appellants' Lot 848, enclosing the part of the southern portion of the roadway that had been open since 1924 over Lot 64 (J.A. 75, 80), thus blocking access to the southern portion of the roadway for the properties lying eastward of Lot 64, i.e., premises 176 North Carolina Avenue, S.E. and the Folger Apartment.

Beginning about 1958 and continually thereafter, the roadway became subjected to continuous abuse and nuisances by certain Appellees, their tenants, and unknown trespassers. The nuisances and abuses consisted of the dumping of all manner of building rubble, debris, broken brick, plaster, lath, discarded furniture, such as couches and chairs, discarded appliances, such as stoves and refrigerators, trash, open barrels of clam shells, and garbage in open containers. (J.A. 32, 36, 37, 39, 103, 104, 111, 210, 211; Defendants' Exhibits Nos. 31, 32, 34).

In 1961 Appellee Schreiber had a very large tree stump dug up from her property and had it placed on the right of way, where it blocked vehicular passage, and ignored Appellants' requests to remove same (J.A. 80) so that Appellants had to hire workmen to have the stump

moved off the right of way (J.A. 203, 233). Not until she had joined with other Appellees in seeking the Temporary Injunction against Appellants, a year after the stump was placed on the right of way, did Appellee Schreiber have it hauled away. (J.A. 39, 79, 80, 232). Appellee Schreiber also stacked cordwood on the right of way, leaving it there during the winter of 1961-1962 (J.A. 79-80); Appellee Horton on one occasion placed a truckload of building rubble on the right of way, which Appellants had to hire workmen to have hauled away (J.A. 103, 104, 201); on other occasions she placed smaller quantities of rubble and debris thereon. Tenants of premises 172 North Carolina Avenue, S.E. habitually used the right of way as a convenient disposal area for their unwanted and discarded furniture, appliances and debris. (J.A. 105; Defendants' Exhibits Nos. 31, 32, 34).

The generally unsanitary conditions on the right of way attracted vermin and scavenging animals and created health hazards for Appellants and their minor children (J.A. 210). Appellants, as owners of the major portion of the roadway were in more or less constant violation of District of Columbia Housing Regulation, Article 261, Sec. 2603, and were subject to possible fine and imprisonment, on one occasion, under District of Columbia Police Regulation, Article 39, Sections 1 and 2. Appellants repeatedly, over a period of four years, had to hire workmen and trucks to have the roadway cleared and the debris hauled away. Appellees and their tenants ignored Appellants' requests to keep the roadway clear; appeals for police aid provided only temporary relief because of the constantly changing tenancy of certain properties, and particularly the Folger Apartment. (J.A. 37, 121, 123, 287, 200, 201, 167, 168, 105).

During the periods when the right of way was cleared, tenants and workmen for various adjoining properties and persons unknown parked vehicles upon the right of way so as at times to preclude Appellants from ingress and egress to their own property (J.A. 37, 38, 39, 82, 103, 129, 137).

In August 1962 Appellants enclosed their Lot 848, and the right of way portion of the roadway, by three sets of double driveway gates of very simple, open construction (J.A. 107, 112), each set of gates opening to provide a 16-foot wide passageway. (J.A. 183, 198). One set of gates faced the public alley, along the western boundary of Lot 848, and had a large sign bearing the inscription, "Private Property - Authorized Users Only" thereon. The other two sets of gates faced, across the 10-foot southern portion of the roadway, the garages at the rear of premises 170 and 172 North Carolina Avenue. The easternmost post upon which the gates were hung abutted the westernmost post of the Schreiber fence across the rear of Lot 64. The gates were not locked but were provided with a slip-board, operable from inside or outside the gates (J.A. 107). Ultimately, a screen door hook was placed on the outside of the gates facing the alley, because the winds blew them open. (J.A. 198).

On March 7, 1963, the North Carolina Avenue Appellees joined with Appellee Gruis in bringing the case at bar, seeking removal of the gates; alleging that Appellants had planted trees and shrubs and had parked automobiles in the right of way area; that Appellees had suffered monetary damages because the gates interfered with their lawful use of the right of way; and alleging irreparable injury unless the right of way was restored to the condition in which it had existed for many decades, because no alternate rear access to their properties was available or obtainable (J.A. 1-4).

The allegation that Appellees had no rear access to their properties except through the right of way area enclosed by Appellants' gates was capricious. The record shows clearly that in addition to the right of way portion of the roadway, all Appellees herein except Horton and Gruis at all times had available for their use as rear access to their properties the 10-foot wide southern portion of the

roadway; and that the fact that Appellees Horton and Gruis did not have this available to them was due to the enclosure, by Appellee Schreiber, in 1961, of the roadway at the rear of her Lot 64.

The record shows further that the gates did not materially interfere with accustomed use of the right of way area by any of the Appellees. Regular services, such as trash and garbage removal, delivery of fuel and other materials, continued for all Appellees, as well as Appellants, while the gates were in place. (J.A. 80, 106, 136). Appellants used the right of way area, via the gates, almost daily (J.A. 74) as did workmen engaged in remodeling the Folger apartment (J.A. 132, 133) and workmen engaged in remodeling premises 176 North Carolina Avenue, S.E. (J.A. 103). Tenants of the Folger Apartment used the right of way area, via the gates from August to November 1962, when the building was vacated preparatory to remodeling; tenants of premises 172 and 170 North Carolina Avenue also used the right of way area. (J.A. 136, 137, 205).

For a brief period the gates became difficult to open, when a corner post sagged, as a result of children swinging on the gates and one of the 9-foot high sliding doors to the garage at the rear of 172 North Carolina Avenue falling across the gates (J.A. 107, 198, 206). The gates were repaired by Appellants' carpenter (J.A. 198). The record does not indicate whether or not the difficulty complained of by Appellees Schreiber and Horton in opening the gates (J.A. 75, 107) occurred during the brief period after the garage door had fallen across them and before they were repaired.

The record shows that the affidavit by Donald Lukens, given in support of Appellees' Motion for Preliminary Injunction in May 1963 (J.A. 23) was misleading to the Court, in that Lukens failed to mention that after the gates were removed pursuant to the Temporary Restraining Order, he was likewise unable to park his 1963 Buick

automobile in the garage on premises 172 North Carolina Avenue, S.E. until he had removed the remaining 9-foot high sliding door, leaving the entire facade of the garage open (J.A. 206, 207, 170).

Appellee Gruis testified that, after he resumed services to the Folger Apartment (which had been discontinued during the period the apartment was undergoing renovation) deliverymen of fuel, and drivers of a trash truck were halted briefly on their first visit to the apartment while they telephoned him to see whether or not they were permitted to go through the gates. (J.A. 135, 136). A witness for Appellees, H. Curley Boswell, who used the garage at the rear of Lot 800 as a storage place for used fireplace mantles, and visited the garage infrequently, testified that he was inconvenienced by not being able to park in his accustomed place in the alley (J.A. 117).

In December 1962, Appellants rescinded, by letter to Appellee Gruis, permission they had extended to him, also by letter in December 1960, to use the right of way. In March 1963 Gruis filed suit to quiet title to an easement by prescription over the right of way; in April 1963 he built a new fence at the rear of his Lot 64, and placed therein a gate opening onto the right of way. In May 1963 Appellants placed a chicken wire barricade across this gate. Appellee Gruis, joined by the North Carolina Avenue Appellees, sought, and obtained from the District Court, a Temporary Restraining Order, permitting them to remove both the chicken wire barricade across Gruis' gate, and the driveway gates along the right of way. (J.A. 15, 285, 288).

After hearing on May 27, 1963, the District Court issued a Preliminary Injunction (J.A. 29), enjoining all parties from obstructing the roadway; requiring Appellees to post penalty bond; and, noting there were disputed questions of fact and law, ordered the case to be specially

scheduled for earliest possible trial.

The case came on for trial on December 2-6, 1963, and judgment of the District Court was for Appellees (J.A. 296).

The District Court declared the question of the validity of the right of way to be moot; found an easement by adverse user over Lots 848 and 849 for all Appellees; dissolved the preliminary injunction; released Appellees from liability under the penalty bonds; enjoined Appellants from erecting any post, fence, gate, or in any manner or degree interfering with use of the right of way by Appellees; ordered Appellants forthwith to remove shrubs or trees planted by Appellants in the easement area; and gave Appellees the right but not the obligation to pave the easement area. The District Court perfected title, by adverse possession, in Plaintiff Gruis to a one-foot strip of Lot 848, and dismissed Appellants' counterclaims against Appellee Gruis, by finding, as a Conclusion of Law on the Counterclaim, that the fence between Lot 46 and Lot 848, and the land thereunder and to the east belonged to Appellee Gruis, and that he had an absolute right to remove said fence. Costs for all Appellees were assigned to Appellants.

ORIGIN OF THE RIGHT OF WAY

In 1910, a public alley was opened by condemnation proceedings (District Court Case No. 884) through Square 734, beginning at First Street, S.E. and bisecting Square 734 up to the point where the western boundary of Appellants' Lot 849 meets the mid-point of the northern boundary line of Lot 800, owned by Appellee Grigsby. Thereafter, until 1924, the property which now constitutes Appellants' Lots 848 and 849, and the property now owned by Appellee Grigsby as Lot 800 had access to this public alley, but properties now known as Lots 66, 65, 64, 3 and 46, now owned by Appellees Julia and Mary Connor, Schreiber, Horton and Gruis, did not have rear access to the alley.

In 1915, appraisers of the Estate of Daniel Allman, Sr. (who had owned, since 1899, the property now owned by Appellants as Lots 848 and 849, and the properties now owned by the North Carolina Avenue Appellees as Lots B, 64, 65 and 66) recommended that a 10-foot strip be taken off the rear of the D Street property to be used for alley purposes for both the D Street property and the North Carolina Avenue properties. The appraisers stated that this would give a direct outlet to the public alley to all of these houses, and to the appraisers' minds, would be very beneficial for a future market (J.A. 262).

In September 1918, Trustees appointed by the Court in a Partition suit brought by heirs of Daniel Allman, Sr., requested the then Supreme Court of the District of Columbia to approve a sale of Lot B, and as a necessary condition of that sale, to approve the placing of a 12 foot right of way over the rear of the D Street property (referred to by the Trustees as "Lot 18") for the benefit of Lot B and Lot Two (Lot Two now consisting of Lots 64, 65, 66 and 800) (J.A. 265). The Court the same day approved the sale of Lot B to the purchaser, one Richardson, and authorized the Trustees, upon payment of the purchase money to them by Richardson, to execute and deliver to him a fee simple title to Lot B, "together with the perpetual right of way for alley purposes, over the rear 12 feet of Lot 18 in said Square, in favor of the owner of Lots Two (2) and said Lot B in said Square" (J.A. 267).

On January 7, 1919, the Trustees asked the Court to approve the sale of "Lot 18" (the D Street property) to one Marie Duff (J.A. 268). The Court approved the sale, no mention of a right of way across the D Street property being made either in the Trustee's request or in the Court order.

On January 9, 1919, the Trustees, citing as their authority for conveying the property a Partition Decree of May 31, 1916 (which made no mention of any right of way) and the Court order of January 7, 1919 (which also made no

mention of a right of way) conveyed to Marie Duff

"All of Original Lot Eighteen (18) in Square 734 except the West Eight (8) feet front by the depth thereof subject to a right of way over the rear Twelve (12) feet thereof for the benefit of Original Lot Two and sub lot B in said Square."

(J.A. 248, 249)

Two weeks later the Trustees, in reporting distribution of the proceeds of the sale of "Lot 18", informed the Court that the sale of Lot B to Richardson had not been consummated, and the deposit had been returned to the purchaser "because of the inability of the trustees to give him the alley privileges over property of others which his purchase contemplated." (J.A. 271). Two weeks later still, on February 4, 1919, they informed the Court that, with respect to sale of Lot B to Richardson, "inasmuch as the purchaser could not obtain the necessary right of way over adjoining properties that his purchase contemplated, the said sale was never closed and the deposit was returned to him. Therefore it becomes necessary to vacate the decree confirming said sale." (J.A. 274).

On February 5, 1919, the decree confirming the sale of Lot B to William Richardson, together with the right of way over "Lot 18" in favor of the owner of Lot Two and B was vacated and set aside by the Court (J.A. 275).

The Trustees, throughout the partition proceedings, had consistently referred to the D Street property as "Lot 18" although Daniel Allman, Sr. had owned only "Lot 18 less the west 8 feet front by the full depth thereof" and they had correctly conveyed to Marie Duff what Daniel Allman, Sr. had owned, citing as their authority for the sale the Court orders of May 31, 1916 and of January 7, 1919, both of which authorized sale of "Lot 18". This discrepancy is important in the creation of Lot 849.

In asking Court approval of the sale of "Lot 18", the Trustees had declared by affidavit that they had obtained consent of all persons interested in the sale, as evidenced

by their signatures, and the Court order was predicated upon consent of all interested parties. Actually, the Trustees for the minor children of William Allman, Sr., who were entitled to a share of the proceeds of the sale, and who received a share of the proceeds of the sale, had not signed the request for sale. (J.A. 271, 273).

The 12-foot wide right of way over the D Street property was not opened on the ground for some six and one-half years after the 1919 conveyance. (J.A. 59).

OPENING OF THE ROADWAY, JULY 1924

In July 1924, owners of Lots 800, 66 and 65, who were dominant tenements of the right of way reserved by the 1919 deed, elected to build garages at the rear of their properties and did so, setting the garages back from the true rear boundary line with the D Street property a distance varying from about 10 feet on the west, to 8 feet on the east, in order to facilitate vehicular access to the garages (J.A. 62).

The record is vague as to circumstances surrounding the building of these garages and opening of the right of way. No participants in these occurrences appeared as witnesses for either side. Only one witness, Appellee Julia Connor, was present on the scene in 1924, and her memory of happenings at that time was incomplete. Julia Connor is a daughter of Margaret Connor, one of the Partition Trustees in the 1919 conveyance which created the right of way. Margaret Connor took up residence in premises 172 North Carolina Avenue, S.E. in 1924 and proceeded to build the garage at the rear thereof.

From the scanty evidence available, the following facts emerge. On December 24, 1923, one Lee Walsky acquired title to the D Street property from Bessie Brown (J.A. 3). Sometime in the early summer of 1924, the fences surrounding the D Street property at the rear were removed (J.A. 58). Garages were built at the rear of Lots 800, 65 and 66 (J.A. 110, 277). After the garages were built, a roadway was

created, consisting of the 12 foot wide right of way reserved by the 1919 conveyance across the rear of the D Street property, and the 8 to 10 foot wide strips of land across the rear of Lots 800, 66, 65 and 64, which faced North Carolina Avenue (J.A. 59). This roadway was then paved (J.A. 51, 59, 115).

Julia Connor testified that she believed the paving had been paid for jointly, by neighboring properties; she knew her mother had paid for it; she thought probably the other adjoining property owners had, also; that she did not remember all of the names, but she did remember the name Lee Walsky (then owner of Appellants' lot 848) in family discussions of the matter, and she thought it possible he had participated in the paving project (J.A. 94, 95, 96). After the roadway was opened, and paved, Walsky built an 8 foot high wooden fence along the north line of the right of way portion of the roadway, separating it from the rest of his land (J.A. 214, 289). The building of the fence by Walsky completed the illusion that the new roadway, similar in width and appearance to the public alley, was a part of the public alley.

USE OF THE ROADWAY AND RIGHT OF WAY BY THE FOLGER APARTMENT

Shortly after the roadway was opened, one William McCray, owner-resident of the Folger Apartment since 1905, against whose rear fence the roadway came to a dead end on the east, rented the newly-built garage on Lot 800. A gate was cut in the fence at the rear of the Folger Apartment (by persons unknown) to permit McCray and his daughter Harriett, also a tenant of the garage on Lot 800, to pass back and forth from the Folger Apartment to the garage (J.A. 61). This use of the roadway by William and Harriet McCray continued from after July 1924 until October 14, 1937, when he conveyed the Folger Apartment (Lot 46) to David and Ida Bernstein.

Other tenants of the Folger Apartment also came to use the open roadway as access to the public alley, and this use by tenants has continued to the present. There is no evidence in the record that this use by tenants was made under lease or other authorization from the landlord, or that there was any privity between tenants. From the time the Folger Apartment was built in 1905, until after October 31, 1947, the service entrance to the building was in the front of the building, by the basement entrance on Second Street, S.E. (J.A. 60, 61, 62, 84, 85).

William McCray conveyed the Folger Apartment to Bernstein on October 14, 1937; Ida Bernstein conveyed it to Odell Blount on September 23, 1947; Odell Blount conveyed it to John D. Neuman and Joseph F. Bruno, also on September 23, 1947; John D. Neuman and Joseph F. Bruno conveyed it to Jebco Maintenance Corporation, a Maryland Corporation, also on September 23, 1947; and Jebco Maintenance Corporation conveyed it to Charles and Tillie Chidakell on October 31, 1947 (J.A. 252, 253).

Owner Tillie Chidakell testified that when she and her husband purchased the property they saw what appeared to be a public alley, beginning at First Street, S.E. and ending at the rear fenceline of the Folger Apartment; they believed it to be a public alley; and they proceeded to remodel the Folger Apartment from a 6 to 16-unit building, and to transfer the service entrance to the rear, via what they believed to be the public alley. (J.A. 84, 85). They did not know the roadway was privately owned; had never requested or obtained permission to use the roadway. Owners of Appellants' property during this period, Lydia Meaders (1945-1951) and Appellants Ishee (1951-) both testified they knew of the use being made by the Folger Apartment of the roadway; the roadway was open; the Folger Apartment use did not interfere with their own use; they did not object to such use (J.A. 32, 71, 178).

There is no evidence in the record as to whether

permission to use the southern portion of the roadway owned by the North Carolina Avenue properties was ever asked or given.

On September 14, 1956, the Folger Apartment was conveyed by Charles and Tillie Chidakell to Reed Liggitt; by Reed Liggitt and his wife Elizabeth to Dorothea Cristofolio; by Dorothea Cristofolio back to Reed Liggitt and Elizabeth, his wife, as tenants by the entirety. The Liggitts owned the Folger Apartment until November 25, 1960 when they conveyed it to Appellee Edward Gruis. During ownership by the Liggitts, their rental manager, John R. Perry, testified he believed the roadway to be a public alley, but had never discussed the matter with the Folger owners Liggitt. Their sales agent, Appellee Tommy Ishee, testified that because of his friendly relationship with owner Reed Liggitt and the fact that, until late in 1958, use by the Folger Apartment did not interfere with use by right of way owners Ishee, he saw no reason to object to use of the right of way by the Folger Apartment. (J.A. 109, 178, 200).

In the autumn of 1960, Appellant Tommy Ishee and Appellee Edward Gruis, almost simultaneously, but unknown to each other, were attempting to get groups of people together to purchase the Folger Apartment and remove the "neighborhood blight". (J.A. 200, 201, 286, 287). Appellee Gruis, on November 2, 1960, informed Appellant Ishee that he intended to form a joint venture to acquire and remodel the Folger Apartment; that he was preparing a prospectus; that he would, when the prospectus was completed, invite Ishee to a meeting to discuss the venture further (J.A. 287). On November 30, 1960 Gruis again wrote to Ishee, stating the date for settlement under the "Purchase Agreement" was not "too far off" and asked Ishee to attend a meeting at Gruis' home on December 4, 1960 to "work out" formal aspects of the proposed venture. Appellant Ishee attended the meeting on December 4, 1960, and two days

later, on December 6, 1960, not having been informed by Gruis either in Gruis letter of November 30, or at the meeting in Gruis' home on December 4, that Gruis had already acquired title to the Folger Apartment by deed dated November 25, 1960, Ishee wrote to Gruis, declining to participate in the venture and advising Gruis that, contrary to Gruis' statement in the prospectus, the Folger Apartment did not have alley access, but use of the rear of the Ishee property was a permissive use. (J.A. 34, 126, 127, 129, 164, 165, 200, 201, 286, 287). Gruis, an attorney by profession (J.A. 121) testified at the trial that he remembered receiving the Ishee letter, but denied remembering that it contained any reference to permissive use (J.A. 127, 128).

On December 1, 1962, after repeated refusal by Appellee Gruis to try to alleviate conditions caused by his tenants and workmen on the right of way, Appellants Ishee wrote to Gruis, rescinding the permission they had extended in December 1960 for use of the rear of their Lot 848 by the Folger Apartment (J.A. 288).

In May 1963, after Gruis had filed the case at bar to quiet title to an easement by adverse possession over Lot 848, and had built a new fence, with a gate opening onto Lot 848, Appellants placed across that gate the chicken wire barricade which precipitated Appellees' Motion for Preliminary Injunction.

CREATION OF LOT 849

The record is not clear as to the origin of Lot 849, which is a narrow strip of land, eight feet wide by the full depth of Lot 18, adjoining Appellants' Lot 848 on the west, and having a frontage of eight feet along D Street, S.E.

The record shows that Lot 849 was sold for unpaid taxes for the year ending June 30, 1925 (J.A. 278) and hence must have been in existence as a separate lot at

least since June 30, 1924; that it was assessed in the name of Bessie A. Brown (J.A. 278) predecessor in title to Lee Walsky, and that Lot 849 apparently was never assessed in the name of Lee Walsky, who acquired Lot 848 from Bessie A. Brown on December 24, 1923 (J.A. 3).

The record is clear that the eight-foot strip of land encompassed by Lot 849 was part of the land owned by Daniel Allman, Sr. and part of the land conveyed by the Partition Trustees to Marie Duff, and by mesne conveyances, to Bessie A. Brown. (Defendants' Exhibit No. 25; Plaintiff's Exhibit No. 41).

Lot 849 was conveyed by the Commissioners of the District of Columbia to Jennie Faust, by deed dated May 2, 1930 and recorded January 7, 1931 (J.A. 278). Lot 849 was purchased by the District of Columbia at tax sale by the Treasurer of the District of Columbia on January 13, 1931, for taxes for the second half of 1930, and was sold and purchased at annual tax sale each and every year thereafter until January 13, 1961 by the District of Columbia. No person paid any taxes on Lot 849 from June 30, 1930 until 1963 (J.A. 280, 281).

The record shows that a deed for Lot 849 was given by Charles I. Russo, Trustee in Bankruptcy of the Estate of Manuel Faust, a bankrupt, to Gray Properties, Inc., under date of November 1, 1938, recorded November 16, 1938 and re-recorded November 18, 1939 to correct an acknowledgment (J.A. 278). At the time of conveyance of Lot 849 by the Commissioners of the District of Columbia to Appellants Ishee on July 30, 1963, Lot 849 was assessed in the name of Gray Properties, Inc. (J.A. 279).

From its dimensions, i.e. a strip of land 8 feet wide by the full depth of Lot 18, it may be assumed that Lot 849 was believed to represent the strip of land 8 feet wide by the full depth of Lot 18 authorized for sale by the Orders of the Supreme Court of the District of Columbia on May 31, 1916 and January 7, 1919 in Equity Case No. 34055, but excepted from the Court-appointed Partition

Trustees' Deed conveying Appellants' D Street property to Marie Duff on January 9, 1919. It may be assumed further, that this 8 foot strip of land was believed to be unowned property, since, although the Court authorized its sale (as the whole of Lot 18), Daniel Allman, Sr. had owned only Lot 18 less the west 8 feet front by the full depth thereof.

For whatever reason, Lot 849 was created as a separate lot prior to June 30, 1924 (J.A. 278) and hence prior to the time that the right of way, and the roadway, were opened to use on the ground, subsequent to July 25, 1924. (J.A. 59). The Office of the Assessor of the District of Columbia did not believe that any easement existed across Lot 849 (J.A. 239); official records available to the Office of the Assessor did not indicate any easement across Lot 849 (J.A. 239, 246, 247; Title 47, Secs. 403 and 407, D.C. Code). Lot 849 was assessed as a full and unencumbered estate, and no diminution in value was ever made to reflect the value of any easement across Lot 849 (J.A. 239, 240, 241, 279).

When the right of way was opened to use, it was opened as an invisible part of a wider roadway, which to all appearances was merely a part of a public alley; no visible 12' foot wide right of way existed across the rear of Lot 849; the point of juncture of the western boundary of Lot 849 with the public alley was imperceptible; there was nothing visible concerning a possible easement which might have led an appraiser to question the official records available in the Office of the Assessor (J.A. 240-242; 246-247).

Lot 849 was assessed and taxed as a full estate, unencumbered by any easement; the District of Columbia's lien for unpaid taxes on Lot 849 was for the full value of Lot 849, undiminished by the value of any easement.

When Appellants Ishee acquired Lot 848 in 1951, a dilapidated fence, part of which had fallen down, stood approximately along the northern boundary line of the right of way. This fence is presumed to be the fence built by Lee Walsky in conjunction with opening of the right of way in 1924. Appellants removed this fence in 1952 or 1953, and thereafter until June 1963, the right of way was open and unfenced on its northern, southern, and western sides. (J.A. 120, 212, 213).

Appellants took up residence on the D Street property in 1957, and proceeded thereafter to built a fence to enclose a play-yard for their children. This fence, built of new oak boards, bore no relation whatsoever to the fence built by Lee Walsky, or the northern line of the right of way, but ran diagonally across about one-third of Lot 848 at a distance of 7 to 10 feet from the true northern line of the right of way, and from 19 to 22 feet north of the true rear boundary of Lot 848. (J.A. 179, 182, 183, 212, 213, 214, 215, 216; Defendants' Exhibit 27).

The presence of this partial fence on Lot 848 apparently led certain Appellees, who had acquired their properties after the 1957-built play-yard fence was in place (Appellees Gruis and Schreiber) or who visited the area very infrequently (Appellee Julia Connor) to affirm, by affidavit and on the stand that Appellants had planted trees and shrubs and had parked cars in the right of way area, whereas said shrubs (no trees were planted) were planted, and said automobile parked, in the area between the play-yard fence and the true northern line of the right of way, an area some 7 to 10 feet in width. (J.A. 74, 78, 81; 149, 150, 151, 154, 219, 220); also, Defendants' Exhibit No. 29, showing a string stretched along the true northern line of the right of way, and the tele-

phone pole located some distance northward of the stretched string. The telephone pole stood outside of (i.e. toward the right of way from) the play-yard fence, built by Appellants in 1957 (J.A. 211, 214-216).

THE FENCE BETWEEN LOTS 46 AND 848

Sometime between 1903 and 1913, a fence was built about one foot over the true boundary line between Lot 46 and Lot 848. The fence was affixed to the soil of Lot 848 by posts. The fence stood in place until December 1962 (J.A. 138).

There is no documentary evidence in the record as to whether the fence was built by owners of Lot 46 or of Lot 848, or as to the exact date the fence was built (J.A. 67, 223). The date of building between 1903, when William McCray acquired what is now Lot 46 by purchase of Lots "F" and "G" from Lydia Conkling (J.A. 256) and 1913, when Appellee Grigsby, a lifelong friend of McCray's daughter Harriet, (J.A. 52) moved into the area (J.A. 48) is assumed. Appellee Grigsby testified as follows: "Q did he McCray at that time [1905] construct any fence along his rear property line? A. He always had a fence there." (J.A. 49).

The fence, if built by McCray, must therefore have been built between 1903 and 1913, a period in which Lot 848 was owned by Daniel Allman, Sr., who until his death in 1915, resided less than 60 feet away from the fence, on premises 170 North Carolina Avenue, S.E. The McCray and Allman families remained on close, friendly terms all of their lives (J.A. 47, 52); the fact that the fence did not stand upon the true boundary line was clearly evident to any observer (J.A. 174).

A tree, believed to antedate 1890 by the fact that it showed 75 rings when cut down in March 1963, stood along and approximately against the true boundary line between Lots 46 and 848 (J.A. 8, 40, 41; Defendants' Exhibits 14-17).

Branches of this tree, which was already a mature tree, some 15 to 25 years old in the period in which the fence was presumably built (1903-1913), extended over, and provided shade for, both Lots 46 and 848 (Defendants' Exhibits 14-17; J.A. 45, 46).

The foregoing are the only facts shown in the record with respect to the building of the fence, which was claimed both by Appellant Ishee (owner of Lot 848) and Appellee Gruis (owner of Lot 46), (J.A. 27, 175).

Until 1924, the fence was a solid fence, with no opening therein. Sometime after July 1924, a gate was cut in this fence so that William McCray and his daughter Harriet could pass back and forth, over the newly-opened roadway, to the garage they had rented on Lot 800, this property being one of the dominant tenements of the right of way to which Appellants' Lot 848 was subject under the 1919 conveyance. The record does not indicate by whom this gate was cut in the fence, or whether it was done with or without the permission of Lee Walsky, then owner of Lot 848, and a presumed participant in the opening of the roadway.

Appellee Gruis claimed that he and his predecessors had exercised exclusive control over the fence (J.A. 8). The record shows no instance of any repairs ever having been made to the fence by any owner of Lot 46. Appellee Gruis ignored, for some 20 months, a notice he received in April 1961 from the District of Columbia, requiring him to "repair dilapidated fence, front and rear yards. This order may be complied with by removal of the fence" and calling for compliance within 30 days. (J.A. 131-133, 277).

The record shows that the fence was repaired, voluntarily, by Appellants, owners of Lot 848, on many occasions, even subsequent to the date of the notice to Appellee Gruis from the District of Columbia, although Appellants had not received any such notice (J.A. 174, 182; 35, 36).

In November 1962 Appellee Gruis vacated the Folger

Apartment of tenants, pursuant to remodeling the building, and in December 1962 he arbitrarily removed the fence between Lots 46 and 848. He had earlier (J.A. 133) removed a fence that separated his property from Lot B, owned by Appellee Horton, said Lot B having along its side a narrow alleyway open to North Carolina Avenue, S.E. (J.A. 106). The removal of the fence between Lot 46 and Lot 848 opened the rear of Lot 848 to four flights of open stairs, then having broken stair-treads, broken or missing spindles in the balustrades, and to four stories of rear porches, then having broken or missing floor boards (J.A. 235-238), and also opened Lot 848 to through passage, via the alleyway across Lot B, to a heavily-travelled thoroughfare, North Carolina Avenue, S.E. (J.A. 106, 133).

Appellants are the parents of ten children, four of whom were under five years of age at the time the fence was removed by Appellee Gruis, and two of whom were toddlers, 17-18 months old. The removal of the fence by Appellee Gruis made the rear of Lot 848 unsafe for these young children (J.A. 177, 208), and in the three month interval between the time the fence was removed (December 1962) and the time a new fence was built (April 1963), Appellants had to build temporary chain link fences across the sides of their property in order to keep their small children from the danger of the then-unrepaired four flights of stairs at the rear of the Folger Apartment, and from access to North Carolina Avenue, S.E., and to keep their dog contained within their property (J.A. 208).

STATUTES AND REGULATIONS INVOLVED

Title 47, Section 47-1002 of the Act of February 28, 1898, 30 Stat. 250, Ch. 2, as amended by the Act of July 1, 1902, 32 Stat. 633, Ch. 1358, Sec. 1 (2) provides as follows:

"SEC. 47-1002. Upon the day specified in Sec. 47-1001, the Commissioners shall proceed to sell or cause to be sold any and all property upon which the taxes remain unpaid and continue to sell the same every secular day until all the property as aforesaid in Sec. 47-1001 shall have been brought to auction and sold. In case

no other person bids the amount due, the said Collector of Taxes shall bid the amount due together with penalties and costs of the same and purchase it for the District."

Title 47, Section 47-1003 of this Act provides as follows:

"SEC. 47-1003. ... Immediately after the day of the sale, upon payment of the purchase money, the Collector of Taxes shall issue to the purchaser a certificate of sale, and if the property shall not be redeemed by the owner or owners thereof within two years from the last day of sale by payment to the Collector of Taxes of said District for the use of the legal holder of the certificate ... a deed shall be given by the Commissioners of the District or his successors in office to the purchaser at the tax sale, his heirs or devisees or to the assignees of such certificate, which deed shall be admitted and held to be *prima facie* evidence of a good and perfect title in fee simple to any property bought at said sale herein authorized.

"Provided that no deed shall be issued unless application therefor be made within 5 years from the last day of sale and if no such application be made then the owner of any property sold as aforesaid, or any other person having an interest therein at the time of redemption, may redeem the property by paying to the Collector of Taxes for the legal holder of the certificate the amount for which it was sold at such sale, exclusive of surplus, plus interest thereon for the first two years after the date of such certificate of sale at the rate hereinabove provided, and for 3 years thereafter at the rate of 6% per annum

"Provided that no deed shall be issued until all taxes and assessments appearing upon the tax books against the property are paid, with penalties, interest, and costs, including taxes for the years for which the District purchased the property at tax sale.

"Provided that no property advertised as aforesaid shall be sold upon any bid not sufficient to meet the amount of tax, penalty and costs; but in case the highest bid of any property is not sufficient to meet the taxes, penalties and costs thereon, said property shall thereupon be bid off by the said Collector of Taxes in the name of the District of Columbia; but the property so bid off shall not be exempted from assessment and taxation but shall be assessed and taxed as other property, and if within two years thereafter such property is not redeemed by the owner or owners thereof, or their legal representatives, by the payment of taxes, penalties and costs due at the time of the sale and that have accrued after that date and 1% thereon for each month or part thereof, or if any property two years after having been so bid off at any sale in the

name of the said District under Sec. 47-1001 to 47-1009 or any other law in force is not or has not been so redeemed as aforesaid (unless it shall be shown that the sale for taxes was irregular and void) then the Commissioners of the District of Columbia or their successors shall, in the name of and on behalf of the District of Columbia, sell said property at public or private sale and issue to any purchaser of such property a deed, which deed shall have the same force and effect as the deed hereinbefore provided for in this section for property sold at the regular annual sale."

Title 47, Section 47-1011 of the Act, as amended March 2, 1936, 49 Stat. 1158, Ch. 111, Sec. 1; June 25, 1936, 49 Stat. 1921, Ch. 804; June 25, 1948, 62 Stat. 99, Ch. 646, Sec. 32 (b); and May 24, 1949, 63 Stat. 107, Ch. 139, Sec. 127, provides:

"SEC. 47-1011. Whenever any real estate in the District of Columbia has been, or shall hereafter be, offered for sale for nonpayment of taxes or assessments of any kind whatsoever, be and shall have been bid off in the name of the District of Columbia, and more than two years shall have elapsed since such property was bid off as aforesaid, and the same has not been redeemed as provided by law, the Commissioners of said District may, in the name of the District aforesaid, petition the United States District Court for the District of Columbia, sitting in equity, to enforce the lien of said District for taxes or other assessments on the aforesaid property by decreeing a sale thereof; and up to the time of the sale hereinafter provided for such property, may be redeemed by the owner or other person having an interest therein by the payment of all taxes or assessments due the District of Columbia upon said property, and all legal penalties and costs thereon, together with such other expenses as may have been incurred by said District prior to, and as a result of, the filing of the action herein provided for."

Title 47, Section 47-403 of the Act of March 3, 1899, 30 Stat. 1377, Ch. 457, Sec. 3 provides in pertinent part as follows:

"The Commissioners of the District of Columbia shall cause to be made daily transcripts and entry on the records of said assessor, of the designations of lots or parcels of land in said District, appearing in instruments of conveyance received for record in the Office of the Recorder of Deeds, and the designation of lots or parcels of land in said District transferred by probated wills, and the person or persons

whom the Commissioners of said District may designate for the purpose of making such a transcription ... will have full access to the records of the Recorder of Deeds and the Register of Wills of said District, and the assessor shall daily furnish the Surveyor with a copy of such transcript."

Section 47-405 of the Act of February 23, 1905, 33 Stat. 737, Ch. 735, Sec. 2 provides in pertinent part as follows:

"The Commissioners of the District of Columbia are hereby authorized and directed to cause to be given numbers to all of said blocks or squares, lots or parcels of land,

"Provided further, that where lots are numbered in duplicate in any block or square which include parts of two or more existing subdivisions, new lot numbers shall be given said lots numbered in duplicate, and new lot numbers shall be given to all parts of lots remaining after the extension of streets or alleys by dedication, condemnation, or purchase, whereby parts of lots have become public property;

"Provided further, that new lot numbers shall also be given to all parts of original and subdivided lots existing on February 23, 1905 on the records of the Assessor and the Surveyor of the District of Columbia."

ARTICLE XXXIX, Sec. 1 and 2 of the District of Columbia Police Regulations provides as follows:

"Sec. 1.. No person shall leave or cause to be left unattended in any place accessible to any child, nor shall any owner, lessee or manager knowingly permit to remain unattended in any place accessible to any child, on the premises under his control, any unused or discarded refrigerator, icebox, freezer, cooler, or any box or container having a capacity of 1½ cu. feet or more, if such device is equipped with any lock or other fastening device which permits the door or lid to be securely fastened. SEC. 2. Any person violating the provisions of Section 1 of the Act shall, upon conviction, be punished by a fine of not more than \$300 or by imprisonment for not more than ten days."

ARTICLE 261, Section 2603 of the District of Columbia Housing Regulations provides:

"The owner, user or any person having a right to use any private passage or alley shall not permit any ashes, debris, dirt, filth, garbage, human or animal waste, litter, refuse, stagnant water or any other insanitary matter to remain on such passageway or alley."

STATEMENT OF POINTS

1. The District Court erred in not dismissing the Complaint upon Appellees' failure to show a complaint.

2. The District Court erred in not finding that the District's public trust title to Lot 849 prevented the intervention of an adverse claim.

3. The District Court erred in failing to rule on the validity of the right of way, and to find it invalid, or, if valid, an easement in gross, not attaching to or running with the land.

4. The District Court erred in failing to find that the tax deeds to Lot 849 extinguished an easement in gross.

5. The District Court erred in finding that user of the rear 12 feet of Appellants' Lots 848 and 849 by Appellees had been "actual, continuous, adverse, open and notorious" for any period of 15 years so as to create an easement appurtenant to the properties of Appellees.

6. The District Court erred in finding that the fence removed by Appellee Gruis belonged to him in that said fence when built was annexed to the realty of Lot 848 and belonged to the owners of Lot 848, their successors, heirs and assigns.

7. The District Court erred in finding that title to a one-foot strip of Appellants' Lot 848 had vested in Appellee Gruis by adverse possession in that such finding was contrary to the evidence and the law.

8. The District Court erred in finding that Appellees had been irreparably injured by Appellants' action in erecting driveway gates along the boundaries of the 12-foot right of way claimed by Appellees in that such finding was contrary to the evidence and the law.

9. The District Court erred in finding that Appellants were entitled to no damages whatsoever for the removal of said fence by Appellee Gruis, and in dismissing the counterclaim pertaining thereto.

SUMMARY OF ARGUMENT

1. Appellees failed to prove that they had a lawful right to use the rear of Lots 848 or 849 either by virtue of a valid right-of-way grant, or by adverse use, or that the gates along and across the rear of Lot 848 deprived Appellees of rear access to their properties. Appellants proved the gates to be a necessary protection to their Lot 848; Appellees showed only that the gates constituted an inconvenience, no greater for Appellees than for Appellants. Under District of Columbia law, even if the right-of-way constituted a valid grant, under the circumstances of the case at bar the gates were not unlawful.

2. In the District of Columbia adverse user does not run against a public right. The levying and collection of taxes is a public right. The District of Columbia is empowered by statute to convey by tax deed a good and perfect title in fee simple to any property upon which an owner has failed to pay all lawfully assessed taxes within a specified time. The intervention of an adverse claim after a property has become saleable for unpaid taxes by the District under due process of law abrogates the right of the District ultimately to convey the property by tax deed; clouds the title conveyable by the District; and can diminish or extinguish the value of the District's tax liens. A District of Columbia tax lien therefore suspends, and the transfer to the District, in public trust, of conveyable title to a property unredeemed two years after tax sale, stops, the running of an adverse claim against that property. The District Court was in error in perfecting title to an easement by adverse user over Lot 849 for any of the Appellees, since the District of Columbia held tax liens against Lot 849 for every year from 1931 to 1963, and had acquired title, in public trust, to Lot 849 in January 1933, when the owner had failed to redeem Lot 849 within two years after tax sale.

3. If title to an easement by prescription over Lot 849 on the basis of adverse use could not be perfected, it was incumbent upon the District Court to rule on the validity of the right-of-way grant and to find either, because the Court order authorizing the right-of-way was subsequently vacated and set aside, that no valid right of way existed, or that because the sole authorization given by the Court to any right of way over Lots 848 and 849 was a right of way in favor of the owner of Lot Two and B, it constituted an easement in gross, a personal right of the owners, and not an easement appurtenant, attached to and running with the land.

4. Under established District law, a tax deed extinguishes all prior claims of any nature whatsoever, except an easement appurtenant to another property, for the reason that in the District of Columbia taxes are assessed in rem and the value of an easement is assumed to have been deducted from the servient and assessed to the dominant estate, unless the contrary is proved. The value of an easement in gross, being a personal right in a property owner, cannot be assumed to have been taken into account in assessing taxes in rem, and hence an easement in gross is extinguished by a tax deed, in this case the tax deed to Lot 849 given by the District of Columbia to Jennie Faust in May 1930, as well as the tax deed to Appellants under date of July 30, 1963. In the case at bar an easement appurtenant would also have been extinguished by the tax deeds because the value of the easement was not deducted in assessing and taxing the servient estate, Lot 849 erroneously believed not to be a part of the servient estate, and the District's tax lien was on the full value of Lot 849, undiminished by the value of any easement.

5. In the District of Columbia, user, to create an estate by adverse possession, must be actual, exclusive, open and notorious, hostile to the true owner and continuous for the period of limitation. Modern Courts elsewhere have

permitted some relaxation of the "exclusive" criterion where an easement by adverse use is concerned, but in such cases, over-riding hostile intent must be shown without a shadow of a doubt. In the case at bar, the District Court did not and could not, find use of Appellant's land by any of the Appellees to be exclusive. The circumstance of the beginning of use of Appellants' land by the North Carolina Avenue dominant tenements, as an open and unfenced portion of a wider roadway, when the grant did not require Appellants to provide an open way, strongly implies a quid pro quo agreement among Appellants' and Appellees' predecessors as joint owners and joint users of the roadway of which the right of way was only a part, which must be construed as permission, and which could not become adverse while joint use continued.

For the Folger Apartment property of Appellee Gruis, mere user, with no hostile intent by Folger Apartment owners prior to 1961 to claim against the true landowners (Appellants Ishee and the North Carolina Avenue properties), and no intent to surrender on the part of the landowners, whose use of the roadway was not hampered by use of the Folger Apartment, was proved. Moreover, since no privity among tenants, and no authorization by lease or other writing from the landlord was shown, user by tenants of the Folger Apartment could not be tacked so as to constitute a 15-year period of adverse use for the benefit of the owners of the Folger Apartment.

It is not necessary to show affirmative expression of permission; intent may be inferred from circumstances of use.

6. Use of a one-foot strip of Lot 848 by Lot 46, while exclusive, actual, open, notorious and continuous for a prescriptive period, was neither adverse nor hostile, the circumstances of the building of a fence one foot beyond a true boundary line to avoid damage or injury to a mature, valuable tree that stood approximately along the true boundary line, when the relationship of the families

of the two adjoining property owners was a long and friendly one, give a strong presumption of implied, if not affirmatively expressed, permission on the part of the excluded landowner to the use of one foot of his land by his neighbor in return for the continued benefit to himself of the shade from the tree standing on his neighbor's land. Such use, begun in permission, could not become adverse while the tree stood. The tree was not felled until March 1963; the District Court was in error in finding that any adverse possession of the one foot strip of Lot 848 had begun prior to March 1963.

7. The fence in question was affixed to the soil of Lot 848 and no agreement that would negate the established rule of law that what is affixed to the soil becomes part of the realty was proved by Appellees. Use or control of the fence by Lot 46 was not exclusive, and therefore could not be adverse under District law. The fence and the land thereunder belonged to Appellant owners of Lot 848; Appellees had no right to remove the fence without the consent of Appellants, and the District Court was in error in dismissing Appellants' counterclaim therefor, and in finding that Appellants were entitled to no damages whatsoever from Appellee Gruis.

ARGUMENT I

Appellees Failed To Prove Their Use Of Appellants' Land Lawful, Or The Gates Along The Boundaries of Appell- ants' Land Unlawful

Appellees contended they had a lawful right to use the rear 12 feet of Appellants' land. The North Carolina Avenue Appellees based their claimed right on a right-of-way reservation in a 1919 deed. Appellee Gruis based his right on 15 years alleged adverse use by his predecessors. Appellees failed to prove the validity of the right-of-way reservation, challenged by Appellants for reasons given

in Argument III herein, or the adverse nature of the use by Appellee Gruis' predecessors, for reasons given in Argument V herein.

Appellees claimed actual damage on the grounds that the gates deprived them of rear access to their respective properties, and alleged irreparable injury in that no alternate rear access was available or obtainable. They waived claim for actual damage at the trial when it was proved (as recited hereinbefore in detail in the Statement of the Case) that the gates had not materially interfered with their normal use of the right of way area, and that the gates had caused them mere inconvenience, no greater for them than for Appellants, who were also daily users of the right of way area.

Appellees' allegation of irreparable injury because no alternate rear access for their properties other than through the area enclosed by the gates was available or obtainable was disproved by the showing that at all times while the gates were in place, the southern portion of the roadway, which had been in use for almost 40 years, was available, and used by, Lots 800, 66, 65 and 64; and that for Lots B and 46 access to the same southern portion of the roadway was obtainable by the removal of the fence erected by Appellee Schreiber in 1961, enclosing a part of the southern portion of the roadway.

This 10-foot wide southern portion of the roadway was identical in width to the 10-foot wide right of way recommended by appraisers in 1915 as desirable and adequate as rear access to the public alley for the North Carolina Avenue properties of Appellees herein.

Appellants proved (as recited hereinbefore in the Statement of the Case) that their land, left open and unfenced, had been subjected over a four-year period to nuisances and abuses which were beyond the control of Appellants, and which Appellants had found impossible to alleviate so long as their land was left open and unfenced,

but which placed Appellants in violation of District of Columbia regulations and made Appellants liable to fine and imprisonment therefor; that the leaving of Appellants' land open and unfenced made it subject to adverse claims, as indicated by the case at bar; and that the gates were a necessary protection to Appellants' property.

This Court, in Preston v. Siebert, 21 App. D.C. 405, 1903, stated:

"Every case properly presents on its own circumstances, and uses and customs undoubtedly have much to do with the question of the reasonableness of an apparent obstruction. Every gate over a right of way is to a greater or less extent an obstruction, but if the circumstances are such that it constitutes no more than a reasonable protection to property, which all parties might well be supposed to have anticipated when the right of way was created, and if such an obstruction as does not unreasonably or in substantial manner interfere with the use of the right of way, a gate should not be regarded as an unlawful impediment to the owner's enjoyment of such a right of way."

Other Courts have held that the erection of fences and gates is compatible with the continued use of an easement (Gerhart v. Heisenback, 164 Pa. Super 85, 65 A (2) 124, 1949); that the erection of gates along or across the junction of a private way with a public way is not unlawful (Chenevert v. Larame, 42 R. I. 426, 108 A, 589, 1920); that a servient owner may establish gates across a right of way where it enters and leaves his property (Silf v. Hane, 262, 446 79 So. (2) 549, 1955); that a servient owner may interfere with an easement when the owner's use is unreasonable (Sharp v. Silva Realty Corp, 134 A. (2) 131 R. I. 1957).

It is submitted that Appellees acquired no easement by necessity to having Appellants' land left open to be used as part of a wider roadway. The general principle that grantors cannot claim a wide way as an easement by necessity when the grant specifies a narrow way, however inconvenient, was affirmed by this Court in Marzo v. Seven Corners Realty, Inc., 171 F. (2) 144 D.C. App. 1948, and by other Courts which have denied an easement by necessity

even though it would require monetary expenditures on the part of those claiming the easement to relocate or alter their garage in order to use only their own lands for a driveway (Miller v. Edmore Homes Corp, 258 App. Div. 837, 137 S. (2) 324, affd. 309 N.Y. 839, 130 N.E. (2) 623, 1955). Still other Courts have held that a grantor cannot himself create a necessity which did not reasonably exist at the time of the original severance (Mitchell v. Seipel, 53 Md. 251, 1879) and that no easement by necessity can arise when the claimants have access to a public road.

It is submitted further that whatever equitable right Appellees might have acquired by virtue of long user or expenditures made in reliance upon the continuance of such user (such as the building of the garages in 1924) was forfeited by Appellees' abuse of Appellants' land; that any balancing of damage and convenience should be in favor of Appellants.

For the foregoing reasons, Appellants contend that the District Court erred in not dismissing Appellees' complaint upon their failure to show a complaint.

ARGUMENT II

An Adverse Claim Against a Property Is Suspended and Cannot Run While a Tax-Delinquent Property Is Subject to Possible Ultimate Reconveyance By a District of Columbia Tax Deed

It is the clear intent of the Congress that the District of Columbia shall have full power to realize all revenues due the District of Columbia for lawfully assessed taxes, under the mandate of Title 47, Sections 47-1001, 47-1002 and 47-1003 of the D.C. Code, which empowers the District of Columbia to offer for sale, to sell, to give at such sale a tax certificate, exchangeable for a tax deed upon the expiration of two years, under specified conditions, to a bidder at such sale, or, in the absence of a satisfactory bid, to purchase in the

name of, and for, the District of Columbia, any property in the District of Columbia upon which taxes are unpaid.

The statute indicates the intent of the Congress to avoid undue hardship to an owner, whose property is sold for a single year's taxes in the District of Columbia, by providing an absolute redemption right for the owner during a two year period after tax sale, and thereafter, up to the point of issuance of a tax deed to a property purchased by the District itself at tax sale, a priority for the owner in the payment of taxes and revenues due the District.

The statute also indicates the clear intent of the Congress that the right and power of the District to collect all tax revenues due shall be absolute and unassailable. After the expiration of the two year redemption period, the owner has no redemption right to a property for which a private bidder at tax sale has received a tax certificate, if the holder of such certificate elects to exercise his prerogative to apply for, and obtain from the District, a tax deed to the property, in exchange for the tax certificate. Under the statute, a tax deed so issued by the District of Columbia "shall be admitted and held to be prima facie evidence of a good and perfect title in fee simple". (Title 47, Sec. 47-1003, D.C. Code). Courts in the District of Columbia have consistently held that a tax deed expunges all previous interests and titles of every nature and vests in the grantee a new and unencumbered title in fee simple (W. C. and A. N. Miller Devel. Co. v. Emig Properties Corp., 1943, 134 F. 2d 36; 77 U.S. App. 205; cert. denied 63 S. Ct. 983, 318 U.S. 788, 87 L. Ed. 1155), the sole exception to this general rule being an easement by grant, appurtenant to another property, when the District's tax lien was on the value of the servient estate diminished by the easement. (Engle v. Catucci, 1952, 197 F. 2d. 597, 91 U.S. App. D.C. 54).

A tax certificate is a transfer of the District's tax lien to the holder of the tax certificate. This lien ripens into equitable title upon the mere expiration of time (two years after tax sale) and the failure of the owner to

redeem within that time, and becomes a legal, undefeatable title under the tax deed issued by the District. This Court held, in Hall v. District of Columbia, 47 D. C. App. 552, that "Until execution of a tax deed, a purchaser at a tax sale acquires no title to the property, but only a lien thereon". This decision had reference to the holder of a tax certificate; it was not an interpretation of the right of the District to convey a property by tax deed nor a reference to the fact that as sovereign, and under statute, the District is obliged to take, and takes, as a public trust, title to any property unredeemed two years after tax sale, said title being thereafter conveyable by the District, mandatorily to the holder of a tax certificate, if the property was privately bid on at tax sale, and at the discretion of the District, to a bona fide purchaser, if the property was bid in and purchased by the District at tax sale, giving for the property in either case a tax deed which, in the language of the statute, "shall be admitted and held to be prima facie evidence of a good and perfect title in fee simple to any property bought at said sale herein authorized." (Title 47, Sec. 47-1003, D.C. Code).

The Act of 1898 itself (Title 47 of the D. C. Code) contains a bar to the intervention of any adverse claim against a property which has, by reason of its owner's failure to pay lawfully assessed taxes, become a public trust, with the District holding title as public trustee for the purpose of realizing all revenues due by resale of the property. This Court held, in Hall v. District of Columbia, *supra*, that the provision in the Act of 1898 "that failure on the part of the District for any cause whatsoever to enforce the liens acquired aforesaid shall not release the property from any tax whatsoever that may be due the District" bars the assertion of intervening rights by adverse possession. This Court also affirmed that intervening claims are barred by holding, in Cobb v. U.S., 1949, 172 F. 2d. 297, 84 U.S. App. D.C. 228, that District liens are junior only to Federal tax liens.

It is long established law in the District of Columbia that no prescription runs against a public right (Pierson v. Elgar, 4 Cranch 1834).

In the District of Columbia, taxes are assessed in rem, on the land itself, and the District under the pertinent statutes is empowered to convey the property as it was assessed, the tax deed conveying out of the District what the District took by tax lien, on the basis of the assessed in rem value.

The intervention of an adverse claim over a property upon which the District has taken a lien based on the value of the property assessed in rem constitutes an abrogation of the statutory power of the District to convey by tax deed what it receives through tax lien; is contrary to the intent of the Congress and the mandate of the statutes regulating the levying and collection of taxes in the District of Columbia, and is contrary to decisions of the Court interpreting these statutes, and clouds a title to a property conveyed by tax deed, contrary to the language of Title 47, Section 47-1003 of the D.C. Code that a tax deed in the District of Columbia shall be admitted and held to be *prima facie* evidence of a good and perfect title in fee simple to any property bought at lawful tax sale.

The Commissioners of the District of Columbia conveyed Lot 849 to Appellants Ishee by tax deed dated July 30, 1963. Lot 849 had, in May 1930, been similarly conveyed by tax deed to one Jennie Faust, and thereafter, until 1963, no taxes had been paid on Lot 849 by any person. In January 1931 the District of Columbia offered Lot 849 for sale for unpaid taxes for the second half of 1930, and, no other person having bid thereon, the Treasurer of the District of Columbia bid in and purchased Lot 849 according to law in the name of the District of Columbia. Lot 849 was similarly offered for sale for unpaid taxes each year thereafter until 1963, and was similarly bid in and purchased by the Treasurer of the District of Columbia.

The owner of Lot 849 (Jennie Faust, from May 2, 1930, by tax deed) did not redeem Lot 849 within the two year period after tax sale ending on January 13, 1933, or at any time thereafter.

Any adverse user of the rear twelve feet of Lot 849 could not have begun prior to July 25, 1924, when the right of way was opened to use. Such user would have run less than eight years as of January 1931, when Lot 849 was purchased by the District at regular annual tax sale, and could have run less than ten years as of January 1933, the end of the two-year redemption period.

It is submitted that the running of any possible adverse user was stopped before it had run a full 15 years, and that the District Court was therefore in error in perfecting title to an easement by prescription on the basis of 15 years' adverse use by any of the Appellees herein over the rear 12 feet of Lot 849.

The Judgment of the District Court sets a dangerous precedent in that by finding that an adverse claim had intervened against a property to which the District had taken a lien for unpaid taxes and a public trust title conveyable as a good and perfect fee simple, the District Court permitted not only a diminution of the value of the property in the interval between the placing of the tax lien and the issuance of the tax deed, as in the case at bar, but established a precedent by virtue of which, under conceivable circumstances, the value of a property could be extinguished, so that the District of Columbia, in contravention of its statutory power, could find itself in the anomalous position of being unable to collect delinquent taxes upon a property either from the property owner or from any other person, the value of the property having vanished in the District's hands, and a tax deed from the District being therefore a worthless scrap of paper, conveying nothing.

ARGUMENT III

The District Court's Failure to Rule
On The Validity Of The Right-Of-Way
Reservation Was Error

The District Court held that the question of the validity of the right-of-way reservation under the 1919 was moot because an easement by prescription was found over Lots 848 and 849 for all Appellees.

The District Court did not so state, but it is presumed that its finding is based on the principle of law that user by dominant tenements of a right of way by grant is presumptively adverse if the grant is subsequently found to be invalid. (Phillips v. Phillips, 215 Md. 28, 135 A. (2) 849, 1957). In the instant case, the right of way was never used under the terms of the grant, as a 12-foot wide passage-way of limited use as a means of access to a public alley, but as an extension of a public alley, subject to the full burden of a public alley. The above-stated principle of law is therefore inapplicable to the instant case, and, further, the right-of-way reservation has not been found to be invalid.

If the right-of-way reservation is invalid, the gates erected by Appellants along the boundaries of their property are not unlawful. If the right-of-way was an easement in gross, it was extinguished by the tax deeds to Lot 849. In either case, it was incumbent upon the District Court to rule on the question of validity, and its failure to do so was error.

ARGUMENT IV

In The District of Columbia A Tax Deed
Extinguishes An Easement By Prescription,
An Easement In Gross, And An Easement Ap-
pertenant If The District's Lien Was On
The Full Value Of The Property, Undiminished
By The Easement

This Court, in a long series of decisions, has affirmed the intent of the Congress that a tax deed shall be a good and perfect title in fee simple, expunging "all interests which spring from record title" and vesting in

the holder "a new and complete title to the property in fee simple". (W. C. and A. N. Miller Devel. Co. v. Emig Properties Corp., *supra*.) In Cobb v. Shore, 1950, 183 F. 2d. 980, 87 U.S. App. D.C. 162, this Court held that a tax deed expunged even an inchoate dower right. In Engle v. Catucci, *supra*, the Court affirmed the general rule by making an easement appurtenant to another property as the sole exception to that rule. The reasoning of the Court in that case was that an easement appurtenant attaches to the dominant property and becomes part of that property, is taxed as part of the dominant property, and the servient property is taxed as an estate diminished by an easement.

This Court said, in its dictum,

"So it would appear that when the servient lot is sold for taxes not paid upon it the easement ought not to pass to the purchaser. The lot should pass subject to the easement, or, to express it another way, the lot less the easement should pass."

The converse of this reasoning is that when an easement is not created by conveyance (i.e., when it is an easement by prescription under a claim of adverse use), or when although created by conveyance, it is an easement in gross, attaching as a personal right to the property owner but not to the dominant property itself, the lot should pass without the easement, the tax deed extinguishing both the easement by prescription and the easement in gross.

In the case at bar, the tax deeds would also extinguish an easement appurtenant, because Lot 849 was not believed to be subject to an easement; the value of an easement was not deducted in assessing and taxing Lot 849; the District's lien was for the full value of Lot 849, undiminished by the value of any easement; and Lot 849 was conveyed by the tax deeds as a full estate, unencumbered by any easement thereon.

ARGUMENT V

In The District Of Columbia, Effective User, To Establish A Prescription, Must Be Open, Notorious, Exclusive, Continuous And Adverse

The District Court, as a Conclusion of Law on the Complaint, found that "actual, continuous, adverse, open and notorious use for a period of 15 years created an easement appurtenant to the properties of all Plaintiffs ... by prescription ... over the rear 12 feet of Lots ... 848 and 849 ... for general alley purposes." The District Court failed to find that user had been exclusive, or hostile.

Courts of appellate jurisdiction in the District of Columbia have consistently held exclusive user to be an essential element in adverse user or possession. This Court, in the case of Umhau v. Bazzuro, 133 F. (2) 356 App. D.C., 1942, declared:

"Effective user, to establish a prescription, must be open, notorious, exclusive, continuous and adverse."

The case of Umhau v. Bazzuro was concerned with use of a right of way by tenants of adjoining properties. This 1942 ruling of this Court affirmed earlier decisions, all specifying exclusive use as an essential element to a prescription. (Reid v. Anderson, 13 App. D.C. 30; Doswell v. De La Lanzo, 20 How. 29, 15 L. Ed. 824; Bradshaw v. Stott, 4 App. D.C. 527; Ward v. Cochran, 150 U.S. 597).

In Reid v. Anderson, *supra*, this Court stated:

"What then are the essential constituents of adverse possession to make it effectual either as ground for recovery in ejectment or as a defense to that action? In the case of Doswell v. De. La Lanzo, 20 How. 29, it was held to be settled law of general application that:

"Possession to be effectual, either to prevent a recovery or vest a right under the statute of limitations, must be actual possession, attended with a manifest intention to hold and continue it. It must be, in the language of the authorities, an actual, continued, adverse and exclusive possession for the space of time required by the statute. It need not be continued by the same person; but when held by different persons it must be shown that a privity existed between them."

This Court, in Bradshaw v. Stott, supra, reversed a finding of a lower Court on the grounds that "elements of actuality and exclusiveness were left out of consideration" by the lower Court, and stated: "Tested by the rule laid down by the Supreme Court [in Ward v. Cochran] and which is the rule laid down by the authorities, it must be conceded that the instructions in this case failed to conform to it." Further citing the Supreme Court decision, this Court stated: "In that decision the rule is recognized and distinctly affirmed, which requires that five elements should concur to create an estate by adverse possession, namely, that it should be actual, exclusive, open and notorious, hostile to the true owner and continuous for 20 years."

While in certain other jurisdictions there has in recent years been some relaxation of the general rule by finding exclusive use not necessary in a prescription, in such cases, Powell (On Real Property, Vol 6, Sec. 1015, p. 759) states: "In prescription the scope of the acquired interest is more closely held to the details of the hostile conduct than it is in adverse possession".

In the case at bar, Appellees failed to prove either exclusive user, or hostile intent, although the burden of proving the use hostile rather than permissive was on them. (McCracken v. Clark, 235 N.C. 186, 69 S.E. (2) 184, 1952). The authorities are abundant that affirmative expression is not necessary to show permission; that permission may be implied or inferred from the circumstances of use; that permission is implied when an owner and neighbors make common and mutual use of a roadway left open for general use; or when use by neighbors is not a burden to, nor inconsistent with, use of the roadway by the owner.

In Bradley's Fish Co. v. Dudley, 37 Conn. 136, the Court stated that:

"Use must be adverse, continuous, open, peaceable for the statutory period, under claim of legal right and not by the mere consent, permission or indulgence merely of the owner of the alleged servient

estate. This is quite obvious in cases where the consent, permission or license is expressly given. But it is no less true where the permission or license is implied, as it well may be from the facts and circumstances under which it was enjoyed."

This Court, following this general rule, stated, in Umhau v. Bazzuro, *supra*, that "where there is no intent on the part of the tenant to claim adversely and no intent on the part of the owner to surrender" user "could not ripen into an easement even though no permission had ever been asked." In Brener-Grantoid Co. v. Glencoe Lime & Cement Co., 169 Mo. App. 295, 152 S.E. 601, the Court stated:

"It seems to be the generally accepted rule in cases such as this where both the owner and another use a way, and it appears that the use of the other person in no manner interferes with that of the owner or injures the road, that the Courts will treat such use as permissive only and not sufficient, in the absence of a more positive and direct showing, to establish a claim of adverse user."

In Monarch Real Est. Co. v. Frye, 133 N.E. 156 (Indiana App. Ct. 1921, it was held that where there is no inconsistency between the ownership of an alleyway and its use by other parties, there can be no prescriptive right. In the case of Anthony v. Kennard, 188 Mo. 704, 724, 87 S. W. 921, 926, the Court held:

"But if the owner of the land opens a road across it for his own use, uses it and keeps it open for his own use, the fact that he sees his neighbor also making use of it, under circumstances that in no way interferes with his own use of it, does not justify the inference that he is yielding to his neighbor's claim of right or that his neighbor is asserting any right; it signifies only that he is permitting his neighbor to use the road."

Appellants' predecessor Lee Walsky, owner of Lot 848 at the time the right of way was opened to use, was under no legal or equitable obligation to leave his land open and unfenced, so that it could be used in conjunction with land owned by Appellees' predecessors to enable them to use garages they were then building at the rear of their properties. That he did so, under circumstances strongly in-

dicating that he participated actively in the process, must be construed as implied permission on his part, under a quid pro quo agreement with the adjoining landowners, predecessors of Appellees herein, for mutual use of the roadway formed of all their lands, as a unit. It is elementary that such use, begun in permission, could not become adverse while the terms of the implied agreement were being fulfilled, i.e., while the roadway was being used peacefully by all. Such peaceful use continued from 1924 until about 1958, when Appellees and their tenants began to abuse the roadway, and Appellants' land. Not until 1958, then, could use of the rear 12 feet of Appellants' Lots 848 and 849 by the North Carolina Avenue Appellees have become adverse; the District Court was therefore in error in finding an easement by prescription on the basis of 15 years' adverse use of Appellants' land by these Appellees; and the District Court was likewise in error in finding that the erection of the gates along Appellants' portion of the roadway constituted unlawful irreparable injury to these Appellees.

For the Folger Apartment, Appellee Gruis failed to prove that user was continuous for any 15 year period, or that it was hostile prior to November 25, 1960. The general principle of law, restated by this Court in Umhau v. Bazzuro, supra, is that while user need not be continued by the same person, a privity must be shown among different persons exercising the user. No privity was shown for any of the tenants of the Folger Apartment. No evidence was given that the right of way was mentioned in any lease or other writing that would indicate user of the tenants was made under color of a lease. User by the tenants of the Folger Apartment was mere individual trespass, and no action could have lain against the apartment owners for the trespass of their tenants. In Umhau v. Bazzuro, supra, this Court held: "In order to ripen into title the adverse user must be of such character that an action for trespass might be maintained therefore."

Under the same principle of law, user for the 13-year period from July 25, 1924 to October 14, 1937 by William

McCrory was likewise not adverse. McCrory and his daughter Harriet used the right of way as a legitimate tenant of the garage on Lot 800, owned by dominant tenements of the right of way, and no action for trespass could have been maintained against McCrory. The fact that he made no attempt, while he owned the Folger Apartment until 1937, to have any of the services for the apartment come through the rear of the building, via the right of way, is adequate indication that he was in no manner making an adverse claim to the right of way.

Four subsequent owners of the building, during the 10 year period after McCrory sold the Folger Apartment, made no effort to have the service entrance transferred to the rear of the building. Not until after October 31, 1947, when new owners George and Tillie Chidakel remodeled the Folger Apartment into a 16 unit building, was the service entrance transferred to the rear (J.A. 83-85). The Chidakels were not claiming adversely; they did not know the roadway was privately owned, but believed it to be what it appeared to be and was used as, a part of the public alley. Owners of Lot 848 Meaders (1945-1951) and Appellants Ishee (1951-) made no effort to stop the use of the open roadway by the Folger Apartment because it did not interfere with their own use, or that of others. Appellant Ishee made no effort to halt use of the Folger Apartment by owner Reed Liggitt (1956-1960) because Appellant Ishee was acting as agent for Folger Apartment owner Liggitt, in the sale of the property, and because of the friendly relationship between them.

Use of the right of way by or for the Folger Apartment could not have become adverse until after November 25, 1960, and after Appellee Gruis ignored Appellants' letter of December 6, 1960, advising Gruis that the use of the right of way by the Folger Apartment was permissive. The District Court was in error in finding use by the Folger Apartment adverse or continuous for any 15 year period so as to constitute a prescription. The District Court was

also in error in releasing Appellees from the penalty bonds under the Temporary Restraining Order and the Preliminary Injunction for the reason that Appellants' action in blocking Appellee Cruis' gate was not unlawful, but was a lawful attempt by a property owner to stop a trespass and Appellants were lawfully enjoined by the District Court Restraining Order and Injunction Injunction.

APPENDIX A

When Plaintiff, in his complaint, set out the boundary line in words, holding that the fence line in the court's election of Plaintiff, and the court's finding that the fence was in Plaintiff's land, was erroneous. And that Plaintiff's fence was in his land, and not in the land of the defendant, and the fence was in his land.

It is submitted to the Court to note, in finding that title to a one foot strip of Appellants' land had vested by adverse possession in Appellee Cruis, owner of Lot 46, relied upon one body of decisions in the District of Columbia holding that enclosure of land beyond the true boundaries of a property is presumed to be adverse because the owner is presumed to have acquiesced in being excluded from enjoyment of his land.

It is submitted that the case at bar does not come within the scope of these decisions, because of the presence of a mature shade tree standing approximately on the true boundary line at the time the fence was built (See Statement of the Case). The tree shaded both properties; the families of the respective property owners at the time the fence was built remained lifelong friends; the jog in the fence beyond the true boundary line at the point where the tree stood was clearly visible; both property owners resided within eyesight of the fence. Owners of the one foot of land excluded by the fence continued to pay taxes on the one foot of land as part of their taxed premises, the Supreme Court holding, in Holtzman v. Douglas, 18 S. Ct. 65,

168 U.S. 278, 42 L. Ed. 466 App. D.C. 1950) that "payment of taxes for 25 years is strong evidence of a claim of title, and failure to make claim or to pay the taxes is some evidence of an abandonment of any rights in the property."

There is no evidence in the record that any overt claim was made to the one foot strip of land by any owner of Lot 46 prior to the institution of this suit; Appellee Gruis, while claiming adversely to the line of the former fence, admitted he did not know "precisely" where the old fence was located, but knew merely that his contractors had informed him that his new fence, built after the tree standing on the true boundary line was felled, stood somewhat eastward of the former fence (J.A. 151).

It is submitted that in view of the foregoing facts, the District Court erred in finding as a Conclusion of Law that Appellee Gruis had acquired, by adverse possession, title to a one foot strip of Appellants' Lot 848.

ARGUMENT VI

Whatever Is Affixed To the Soil Becomes Part Of The Realty Unless Contrary Agreement For A Prescriptive Period Negates The Rule

The fence dividing Lot 848 from Lot 46, when built, was affixed to the soil of Lot 848. The general rule of the common law is that "whatever is fixed and annexed to the soil becomes part of it and cannot be removed except by him who is entitled to the inheritance." (Warren, Cases on Property, p. 678). Powell (On Real Property, Vol. V, Sec. 692, p. 251) states:

"A substantial number of jurisdictions have provided for the proposition that a landowner or tenant may erect a fence upon his neighbor's land by mistake and have passed laws which allow the builder to remove the fence if he acts within a specified time. Except in a case coming within such a statute, a fence is normally considered to be part of the land and to belong to the owner of the land on which it is erected."

The presence of the tree on or along the true boundary line and the fact that a jog in the fence at the point where

the tree stood was clearly visible give strong indication that the fence was not located by mistake. On the basis of insubstantial evidence (See Statement of the Case) the builder of the fence is presumed to be the owner of Lot 46, although there is no real evidence to this fact. There was no evidence presented in the case that any agreement existed between the owner of Lot 46 and the owner of Lot 848 that the fence could be removed without penalty by the owner of Lot 46, although the circumstances of the building of the fence do indicate that there must have been some agreement, implied if not affirmatively expressed, between the respective property owners that the fence could be built where it was built in order to avoid damage or injury to the large tree which shaded both properties.

Appellee Gruis claimed exclusive control of the fence by himself and his predecessors. The record shows no instance where any repairs were ever made to the fence by Appellee Gruis or his predecessors; Appellee Gruis did not even know the precise location of the fence. The record also shows that repairs were made to the fence by owners of Lot 848; that these owners replaced the gate on several occasions when it had become unhinged, and made other repairs, all of which negates the exclusive control claimed by Gruis for himself and his predecessors.

There is no real evidence that a gate cut in the fence in 1924 to allow owner-resident of the Folger Apartment on Lot 46 William McCray to pass through to the public alley was cut by McCray, or without the permission of the owners of Lot 848. Owners of Lot 848 knew precisely where the fence was located, and that it stood upon their land, and they continued to pay taxes on the land to which the fence was affixed for more than 50 years after the fence was built. (See Holtzman v. Douglas, supra, re the paying of taxes for 25 years being strong evidence of claim of title).

On the basis of the foregoing facts, it is submitted that the District Court erred, both in finding that the fence and the land thereunder belonged to Appellee Gruis, and in

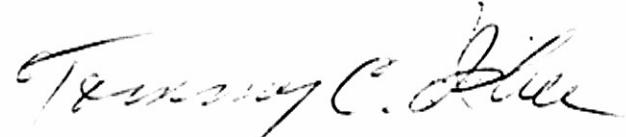
dismissing Appellants' Counterclaim for damages from Appellee Gruis for his removal of the fence without Appellants' permission.

CONCLUSION

It is submitted that this is an appropriate cause for the Court to remand with directions to enter summary judgment for Appellants. The trial was held before the Court without a jury, and the entire record, with the exception of transcripts of testimony of a few character witnesses, and one witness who appeared for Appellants only to prove that the right of way was not opened until 1924, a fact established by other evidence in the record, is before this Court.

For the foregoing reasons it is submitted that the order of the District Court should be remanded with directions to enter summary judgment for Appellants.

Respectfully,



TOMMY C. ISHEE
Appellant Pro Se



MARYCLAIRE A. ISHEE
Appellant Pro Se

November 1964

BRIEF FOR APPELLEES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,740

TOMMY C. ISHEE, et al.,
Appellants,

v.

JULIA D. CONNOR, et al.,
Appellees

*Appeal from the United States District Court
for the District of Columbia*

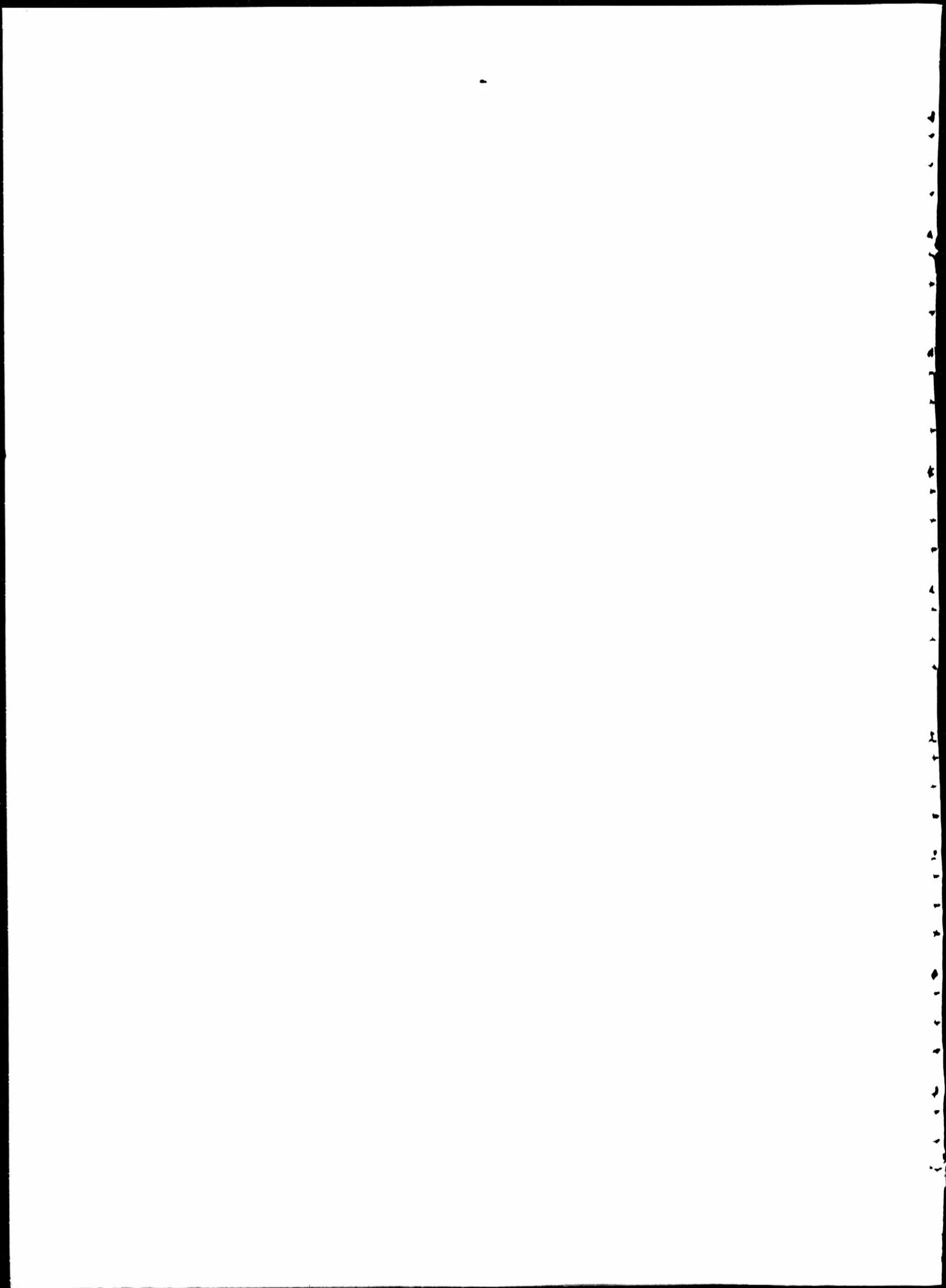
United States Court of Appeals
for the District of Columbia Circuit

FILED JAN 13 1965

Nathan J. Paulson
CLERK

JAMES C. WILKES, JR.
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Washington, D.C. 20005

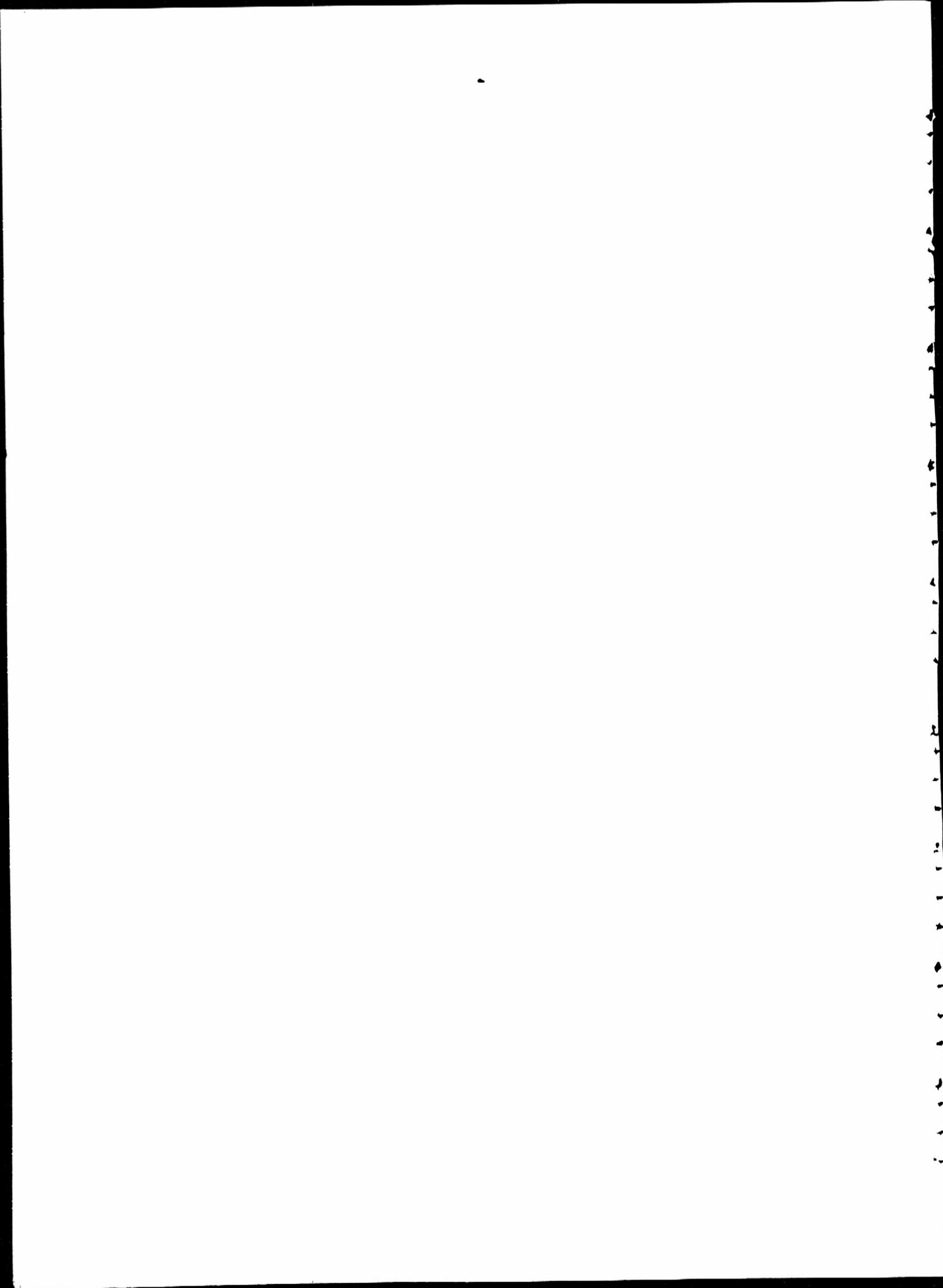
Attorney for Appellees



(i)

STATEMENT OF QUESTIONS PRESENTED

1. Did the trial court commit reversible error by entering a judgment for an easement by prescription based upon findings of fact and conclusions of law that the use was actual, continuous, adverse, open and notorious for a period of 15 years, without specifically including the terms "hostile" and "exclusive"?
2. Does the evidence in this case establish the basis upon which the trial court could properly make a finding that the use of the subject right of way was "actual, continuous, adverse, open and notorious" for the applicable period of 15 years?
3. Was it reversible error for the court to conclude that the issue of the validity of a deed creating a right of way as to some of appellees was moot after finding facts and adopting conclusions of law that an easement appurtenant to the land of all appellees was established by prescription?
4. Does prescriptive use of a 12 foot wide strip of land owned by another for general alley purposes serving 5 houses and an apartment house abutting said 12 foot wide strip of land, including ingress and egress to and from the 5 houses and an apartment house, trash collection, garbage collection, deliveries of coal and fuel oil, and similar alley uses, create an easement appurtenant or an easement in gross?
5. Does a tax deed to a lot over which lies an easement created by prescription and appurtenant to other lots extinguish the easement?
6. Does fee simple title vest in the District of Columbia when it bids the amount of taxes, penalties and costs so as to comply with the Act of Congress that no tax be made for a lesser amount so as to preclude the establishment of an easement by prescription under the theory that prescription will not lie against a sovereign?
7. Can appellants, who obtained a tax deed in 1963, over 4 months after the complaint was filed herein, to the west 8 feet of the subject 66.1 foot right of way, with not less than 12 years' knowledge of the



(i)

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5. Does a tax deed to a lot over which lies an easement created by prescription and appurtenant to other lots extinguish the easement?
6. Does fee simple title vest in the District of Columbia when it bids the amount of taxes, penalties and costs so as to comply with the Act of Congress that no tax be made for a lesser amount so as to preclude the establishment of an easement by prescription under the theory that prescription will not lie against a sovereign?
7. Can appellants, who obtained a tax deed in 1963, over 4 months after the complaint was filed herein, to the west 8 feet of the subject 66.1 foot right of way, with not less than 12 years' knowledge of the

(ii)

clearly visible use of the right of way, and having themselves concurrently with appellees, used said right of way over land owned by another, defeat appellees' right of way by prescription, on the ground that seven years after the adverse use commenced the District of Columbia had a tax lien from 1931 to 1939, under circumstances where a deed duly recorded in 1919 purported to create an easement over the identical area and was specifically set forth in 8 subsequent instruments recorded among the land records of the District of Columbia.

8. Did the court commit reversible error in finding that the erection by appellants of barricades consisting of wooden posts and fencing constructed primarily of heavy oak, in sections 8 ft. in length and 4 ft. in height, along the west end of the right of way near the public alley and along the south line of the right of way in front of the garages located on properties abutting the easement and almost daily parking a car in the subject right of way, and planting trees or shrubs in the right of way, and erecting a chicken wire fence barricade across the opening in the rear fence of the apartment house which abutted the right of way all with the intent and purpose of impeding, obstructing, and otherwise interfering with the use by appellees of the subject right of way for general alley purposes, constituted an unreasonable obstruction of appellee's use and enjoyment of said right of way?

9. Did the court commit error in not implying permission under the facts and circumstances of this case?

10. Did the court commit reversible error in finding that fencing constructed in 1905 enclosing as a part of the rear yard of the apartment house the rear of lot 46 plus a part of lot 848 one foot west of the rear line of lot 46 resulting in the establishment of title to said fence and said 1 foot strip in the owner of the apartment house by adverse possession to the end that the replacement of said fence in 1963 was a matter of right as distinguished from an actionable wrong?

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BRIEF FOR APPELLEES

COUNTERSTATEMENT OF THE CASE

In the opinion of appellees, a counterstatement of the case is necessary to correct inaccuracies and omissions in appellants' statement.

For purposes of orientation, see plat attached hereto entitled "Outline of Subject Properties."

On March 20, 1860, Daniel Allman, Sr., ancestor of appellees, Julia D. Connor, Mary Connor and Dorothy Breuninger Grigsby, acquired title to the east 46 feet from front to rear of original Lot 2 in Square 734, which is now known as Lots 64, 65 and 66. (Complaint and Answer, J.A. 1-3, 6; P's Ex. No. 15 (Equity Case No. 34055) J.A. 258-267, 271, 274-275).* On August 8, 1899, Daniel Allman, Sr. acquired title to original Lot 18 comprising what is today known as Lot 848, which appellants thereafter acquired 52 years later on November 30, 1951, and Lot 849, which appellants acquired by tax deed from the District of Columbia on July 30, 1963 (Ps' Ex. No. 43, J.A. 279). Prior to the death of Daniel Allman, Sr., on September 9, 1915, he additionally acquired title to Lot "B" (Complaint and Answer, J.A. 1-3, 6; Ps' Ex. No. 15 (Equity Case No. 34055) J.A. 259-267, 271, 274-275). The parents of appellee Grigsby acquired Lot 800 in 1898 (Grigsby, J.A. 47-48).

In 1912 a public alley had been created (Ps' Ex. Nos. 53 [District Court Docket No. 844]) which extended from First Street eastwardly to land owned by the parents of appellee Grigsby (Lot 800), and land owned by Daniel Allman (Lots 849, 848, 64, 65, 66 and B) (Ps' Ex. Nos. 19 and 24 [photo 9], 28, 32, 40, 45, 52; Ds' Ex. No. 23), the uncle of appellee Grigsby's mother (Grigsby J.A. 47) and the grandfather of appellees Mary and Julia Connor (Grigsby J.A. 53; M. Connor J.A. 86; J. Connor J.A. 93).

* Plaintiffs' and Defendants' exhibits are abbreviated as "Ps' Ex. No." and "Ds' Ex. No.", respectively.

In Equity Case No. 34855 in the United States District Court for the District of Columbia (Ps' Ex. No. 15 [Equity Case No. 34055], J.A. 260-276) trustees, pursuant to the authority of said District Court, conveyed a portion of Lot 18, which Lot 18 had a frontage on D Street of 64.2 feet (Ps' Ex. 41), namely, all of said Lot 18 except the west 8 feet front by the depth thereof (Ps' Ex. No. 2, J.A. 248-249), or, in other words, the east 56.167 feet of said Lot 18 (Ps' Ex. 53 [District Court Docket No. 844-plats]), now known for purposes of assessment and taxation as Lots 848 and 849. The conveyance of this portion of Lot 18 (Lots 848 and 849), moreover, was made subject to a right of way over the rear 12 feet of said Lots 848 and 849 for the benefit of original Lot 2 and sub Lot B, now known as Lots 800, 66, 65, 64 and "B" (Acker, J.A. 158-159; M. Ishee, J.A. 208-209, 240). On July 25, 1924, the construction of garages at the rear of Lots 800, 66 and 65 (Grigsby J.A. 48-49; M. Connor J.A. 87; J. Connor J.A. 93-94; Ps' Ex. No. 16, J.A. 277; Ps' Ex. Nos. 17-23, 24 [photos 7, 8 and 9], 31, 34 and 45; Ds' Ex. Nos. 3 and 23), and the paving of said 12 foot right of way over the rear of Lots 848 and 849 (Grigsby J.A. 51, 59; M. Connor J.A. 87; J. Connor J.A. 94, 96; Boswell J.A. 115; T. Ishee J.A. 185; Ps' Ex. Nos. 21, 22, 31, 34, 40, 45, 52; Ds' Ex. Nos. 17, 29 and 32), was completed by the ancestors of appellees' Grigsby and Mary and Julia Connor and coincident therewith, the owner of Lot 46, who had constructed thereon the Folger Apartments and a back fence parallel to and one foot to the west of the west property line of Lot 46 in 1905 (Gruis, Supp. Aff., J.A. 27; M. Ishee Dep. J.A. 41; T. Ishee Dep. J.A. 44; Grigsby J.A. 49, 53; Wentz J.A. 67; Gruis J.A. 130-131; T. Ishee J.A. 174-176, 187-188; M. Ishee J.A. 222-223; Ps' Ex. Nos. 20, 21, 22, 28, 31, 33, 34 and 40; D's Ex. Nos. 10 and 15), cut a gate into said back fence at the east side of said right of way over the rear 12 feet of Lots 848 and 849 (Gruis Supp. Aff. J.A. 27-28; Grigsby J.A. 49-50, 57, 60-61, 64; M. Connor J.A. 88-89; Ps Ex. Nos. 20, 22, 31, 33, 34, 40). From July 25, 1924 said right of way over the rear 12 feet of

Lots 848 and 849 was used continuously for general alley purposes by the owners and occupants of Lots 800, 66, 65, 64, B and 46 (J. Connor Aff., J.A. 12; Gruis Aff. J.A. 14; Schreiber Aff. J.A. 24; Gruis Supp. Aff. J.A. 27; Grigsby J.A. 50-52, 60-61; Meaders J.A. 70-71; Schreiber J.A. 73; Chidakel J.A. 83-6-85; M. Connor J.A. 87-88; J. Connor J.A. 94, 97-99; Horton J.A. 102; Perry J.A. 109; Boswell J.A. 111, 116-117; D.G. Winters J.A. 119; Long J.A. 119-120; Gruis J.A. 123, 140-141; T. Ishee J.A. 161-162). The aforesaid actions and uses were taken without obtaining the consent at any time of any owner of said Lots 848 and 849 (Gruis Supp. Aff. J.A. 27; Grigsby J.A. 52-53; Meaders J.A. 70; Chidakel J.A. 83-b-84; M. Connor J.A. 89; J. Connor J.A. 94-95; Horton J.A. 101; Perry J.A. 109; Boswell J.A. 113; Gruis J.A. 125; T. Ishee J.A. 178). Since before the construction of said garages, paving of said right of way, and creation of access to said right of way from Lot 46, namely since on or before January 1924 through December 31, 1941, or later, title to Lots 848 and 849 was vested in Lee Walsky (Archer J.A. 158-159; Ps' Ex. No. 42, J.A. 278). None of the appellees who have had personal knowledge of the subject property dating back to prior to the turn of the century had either never heard of nor never met Lee Walsky (Grigsby J.A. 59; J. Connor J.A. 95). Lee Walsky did not appear as a witness in this case. Lydia Meaders, who was owner and occupant of Lot 848 from August 3, 1945 through November 30, 1951 (Meaders J.A. 68; Ps' Ex. Nos. 3 and 4, J.A. 251), continuously observed the use of the rear 12 feet of Lots 848 and 849 for general alley purposes by the owners and occupants of Lots 800, 66, 65, 64, B and 46 (Meaders J.A. 69-72), and at no time consented to such use (Meaders J.A. 69-70). Appellants purchased Lot 848 on November 30, 1951 (T. Ishee J.A. 160; M. Ishee J.A. 199; Ps' Ex. No. 251, J.A. 251), but continuously utilized Lot 848 as a tenement (T. Ishee J.A. 160; M. Ishee J.A. 199) until they moved into the premises located upon Lot 848 in 1957 (T. Ishee J.A. 161; M. Ishee J.A. 199). Appellants at no time either consented or objected to the use of the

rear 12 feet of Lots 848 and 849 for general alley purposes by the owners and occupants of Lots 800, 66, 65, 64, "B" and 46 (T. Ishee J.A. 178). Title to Lot 46 was vested in David Bernstein and spouse from October 14, 1937 to October 31, 1947 (Ps' Ex. Nos. 5 and 7, J.A. 251-252), in Tillie Chidakel and spouse from October 31, 1947 until September 14, 1956 (Chidakel J.A. 83-a, 83-b; Ps' Ex. Nos. 8, 12, J.A. 253, 254); in Reed Liggitt from September 14, 1956 until February 6, 1961 (Ps' Ex. Nos. 11, 12, 13 and 14, J.A. 254-255, Ps' Ex. No. 14, J.A. 255); and in appellee Gruis from February 6, 1961 to date (Gruis, J.A. 121, 125-126; Ps' Ex. No. 14, J.A. 255). David Bernstein died prior to 1947 (Ps' Ex. No. 7, J.A. 252). Tillie Chidakel observed upon her acquisition of Lot 46 and throughout the period of her ownership thereof that the right of way over the rear 12 feet of Lots 848 and 849 was in use by the occupants of Lot 46 for general alley purposes (Chidakel J.A. 83-b-84). Mr. Perry managed the Folger Apartments on Lot 46 during the period of ownership by Reed Liggitt and the aforesaid use of the right of way was made continuously during said period (Perry J.A. 108-109). Appellee Gruis observed such use prior to his acquisition of Lot 46 (Gruis, J.A. 140-141) and such use continued throughout the period of his ownership except when lawfully obstructed by appellants (Gruis Aff., J.A. 14; Gruis J.A. 123). Neither Chidakel nor Perry nor Gruis at any time obtained or acquired consent to such use from the owners of either Lot 848 or 849 (Chidakel J.A. 836-84; Perry J.A. 109; Gruis J.A. 125).

Appellants acquired from the District of Columbia Government a tax deed to Lot 849 during the pendency of this proceeding, namely, by instrument dated July 30, 1963, five months after appellees filed their complaint in the District Court (M. Ishee J.A. 199, 230; Ps' Ex. No. 43, J.A. 279). There is no testimony whatsoever in the record of this case with regard to whether or not a right of way over the rear 12 feet of Lot 849 was considered by the District of Columbia in assessing Lot 849, excepting with respect to the assessment for the fis-

cal year 1964 (Hall J.A. 241). The appraiser of the Office of the Assessor of the District of Columbia, in assessing either Lots 848 or 849, did not take into consideration the right of way created at the rear 12 feet thereof by deed dated January 9, 1919 and recorded among the land records of the District of Columbia (Hall J.A. 242). In making assessments the appraisers are required by law and do in fact make an inspection of the property being assessed (Hall J.A. 241). The appraisers take into consideration rights of way which they observe as a result of such inspection (Hall J.A. 242). Appraisers of the District of Columbia in making assessments do not have time to check records for the purpose of ascertaining the existence of rights of way created by deed (Hall J.A. 242, 246), but do in all instances make an inspection of the property.

In August 1962, appellants obstructed the right of way by causing to be erected barricades, consisting of wooden posts and fencing (J. Connor Aff., J.A. 12; Gruis Aff., J.A. 14; Lukens Aff., J.A. 23; Schreiber Aff., J.A. 24; Gruis Supp. Aff., J.A. 27; Grigsby J.A. 53-54, 55; Schreiber J.A. 75, 78; Horton J.A. 107; Gruis J.A. 135-136, 151, 155-156; Ps' Ex. Nos. 17-23, 24 [Photos 5, 7, 8 and 9], 31-32, 34, 40, 45), constructed primarily of heavy oak (Grigsby J.A. 55; Schreiber J.A. 75, 83; Horton J.A. 107; T. Ishee J.A. 179-180, 194), in sections eight feet in length and 4 feet in height (T. Ishee J.A. 197-198; Ps' Ex. Nos. 24 [Photos 7, 8 and 9], 34), along the west end of the right of way near the public alley and along the south line of the right of way in the front of the garages (J. Connor Aff., J.A. 12; Lukens Aff., J.A. 23; M. Connor J.A. 89; Boswell J.A. 116, 118; Ps' Ex. Nos. 17-23, 24 [Photos 7, 8 and 9], 31, 34 and 45) located on Lots 800, 66 and 65, and thereafter almost daily parked a car in the subject right of way (J. Connor Aff., J.A. 12; Gruis Aff., J.A. 14; Schreiber Aff., J.A. 74, 78; M. Ishee J.A. 216, 219; Ps' Ex. Nos. 21, 24 [Photos 4, 5, 7, 8, 9]), planted trees and shrubs in the right of way (Gruis Aff., J.A. 14; T. Ishee, J.A. 196-197; M. Ishee J.A. 219-220; Ps' Ex. Nos. 21, 24

[Photo 4], 40), and thereafter, on May 16, 1963, erected a chicken wire barricade across the opening in the rear fence of Lot 46 (Gruis Supp. Aff., J.A. 27; Grigsby J.A. 56; Long J.A. 120; Gruis J.A. 124, 150; Ps' Ex. No. 24 [Photos 4 and 5] and 29), which counsel for appellees demanded be removed by certified letter dated September 24, 1962 (T. Ishee J.A. 191; Ps' Ex. No. 47). On March 7, 1963, appellees filed their complaint in the District Court (Complaint J.A. 1) and the barricades were removed pursuant to order of the Honorable Judge David A. Pine after a full hearing held on May 20, 1963 (Temporary Restraining Order J.A. 15), which temporary restraining order was merged into a preliminary injunction signed by the Honorable Judge Luther A. Youngdahl after hearing on June 6, 1963 (Preliminary Injunction J.A. 29). The permanent injunction was entered by the Honorable Judge Burnita Sheldon Matthews after a one week trial on March 9, 1964 (Permanent Injunction J.A. 296).

STATUTES INVOLVED

Title 47, District of Columbia Code (1961 Edition), Sec. 47-701, Act of August 14, 1894, c. 287, Sec. 1, 28 Stat. 282, provides in relevant part:

"Sec. 47-701. Assessments to be made in the name of the owner. All real property in the District of Columbia, except as hereinafter provided, shall be assessed in the name of the owner * * *."

Title 47, District of Columbia Code (1961 Edition) Sec. 47-705, Act of August 14, 1894, c. 287, Sec. 6, 28 Stat. 283, provides in relevant part:

"Sec. 47-705. Said Board of Assistant Assessors shall, from actual view and from the best sources of information in its reach, determine the value of each separate tract or lot of real property in the District of Columbia ***."

Title 47, District of Columbia Code (1961 Edition) Sec. 47-713, Act of July 1, 1902, c. 1352, Sec. 5, 32 Stat. 616; Act of March 1, 1921, c. 95, Sec. 1, 41 Stat. 1195; Act of June 29, 1922, c. 249, 42 Stat. 669; Act of July 3, 1926, c. 759, Sec. 4, 44 Stat. 833, provides in relevant part:

"Sec. 47-713. All real estate in the District of Columbia subject to taxation, including improvements thereon, shall be listed and assessed at not less than the full and true value thereof in lawful money ***."

Title 47, District of Columbia Code (1961 Edition) Sec. 47-801a, Act of December 24, 1942, c. 826, Sec. 1, 56 Stat. 1089; Act of April 9, 1943, c. 41, Sec. 1, 57 Stat. 61, provides in relevant part:

"Sec. 47-801a. The real property exempt from taxation in the District of Columbia shall be the following and none other: ***(b) Property belonging to the District of Columbia."

SUMMARY OF ARGUMENT

1. Subjective hostile intent to commit a wrong is not a necessary ingredient of prescription. Honest mistake is satisfactory. Greater consideration is due to a title by adverse possession based upon honest mistake than the one based upon deliberate and wilful wrong. *McMillan v. Fuller*, 41 App. D.C. 384, *Johnson v. Thomas*, 23 App. D.C. 141 and *Rudolph v. Peters*, 35 App. D.C. 348. While "exclusiveness" is a necessary element to obtain title in fee simple by adverse possession, it is not a necessary element to obtaining an easement by adverse use.

2. Testimony introduced by appellees of witnesses who were in their thirties when the garages were constructed in 1924 and of many other witnesses, clearly established the basis

upon which the trial court could properly make a finding that the use of the subject right of way was "actual, continuous, adverse, open and notorious" for three alternate periods of prescription, one commencing in 1924, one commencing in 1937, and one commencing in 1945, any one of which periods would have been completely adequate for the purposes of the judgment rendered by the trial court.

3. Properties of all appellees were not included in the 1919 deed which purported to create an easement. Therefore, it was necessary that the court fully hear all evidence pertaining to prescription. Having found three alternate periods of prescription, any one of which would have vested title in all appellees to the subject right of way, the issue of the validity of the deed was moot.

4. Prescriptive use of a 12 foot wide strip of land owned by another for general alley purposes serving five houses and an apartment house abutting said 12 foot wide strip of land, including ingress and egress to and from the five houses and apartment house to and from a public alley, trash collection, garbage collection, deliveries of coal and fuel oil, and similar alley uses, created an easement appurtenant and not an easement in gross.

5. A tax deed to a lot over which lies an easement created by prescription and appurtenant to other lots does not extinguish the easement. *Engle v. Catucci*, 91 U.S. App. D.C. 54, 197 F.2d 597. While the *Engle* case involved an easement appurtenant created by deed, the reasoning and other case law of the District of Columbia clearly show it is equally applicable to an easement created by prescription. Title by prescription is as perfect as title acquired by deed from the record owner. *Scott v. Harrell*, 31 App. D.C. 45.

6. Fee simple title does not vest in the District of Columbia when it bids the amount of taxes, penalties and costs due so as to comply with the Act of Congress that no tax sale be made for a lesser amount, and, therefore, the establishment of an easement by prescription was not precluded under the theory that prescription will not lie against a sovereign. Subsequent to such bids, Lot 849 was continually assessed in the name of an owner other than the District of Columbia which was not exempted from assessment and taxation.

7. Appellants cannot defeat appellees' right of way by prescription by obtaining a tax deed in 1963, over four months after the complaint was filed herein to the west 8 feet of the subject 66.1 foot right of way, with not less than 12 years knowledge of the clearly visible use of the right of way, and having themselves concurrently with appellees used said right of way over land owned by another, on the ground that 7 years after the adverse use commenced, the District of Columbia had a tax lien from 1931 to 1939, under circumstances where a deed duly recorded in 1919 purported to create an easement over the identical area and was specifically set forth in eight subsequent instruments recorded among the land records of the District of Columbia, some of which were executed by Appellants.

8. The trial court did not commit reversible error in finding that the erection by appellants of barricades consisting of wooden posts and fencing constructed primarily of heavy oak, in sections 8 feet in length and 4 feet in height, along the west end of the right of way near the public alley and along the south end of the right of way in front of the garages, located on properties abutting the easement and almost daily parking a car on the subject right of way, and planting trees and shrubs in the right of way, erecting a chicken wire fence barricade across the opening in the rear fence of the apartment house which abuts

the right of way, all with the intent and purpose of impeding, obstructing, and otherwise interfering with the use of appellees of the subject right of way for general alley purposes, constituted an unreasonable obstruction of appellees' use and enjoyment of the said right of way.

9. The court did not commit error in not implying permission under the facts and circumstances of this case. Open and continuous use of another's land is presumed to be adverse in the absence of evidence to the contrary. *Kogod et al v. Cogito*, 91 U.S. App. D.C. 284, 200 F.2d 743. There was utterly no evidence of permission. Appellants have misstated facts on the basis of which appellants argue that permission should be implied.

10. The court did not commit reversible error in finding that fencing constructed in 1905 enclosing as a part of the rear yard of the apartment house the rear of Lot 46 plus a part of Lot 848, one foot west of the rear line of Lot 46, resulted in the establishment of title to said fence and said one foot strip in the owner of the apartment house by adverse possession to the end that the replacement of said fence in 1963 was a matter of right as distinguished from an actionable wrong. Dismissal of appellants' counterclaim for damages for removal of the old fence in connection with replacement thereof by a new cedar screen fence as a part of the complete renovation of the apartment house located on Lot 46 was, therefore, proper. Actual enclosure by a fence is the clearest type of evidence of adverse possession. While title to such improvement did not vest when it was constructed in 1905, it did vest at the expiration of the period of prescription in 1920. *McMillan v. Fuller, supra*.

ARGUMENT I

The trial court did not commit reversible error in finding an easement by prescription created by 15 years of "actual, continuous, adverse, open and notorious" use, without specifically determining such use to also be "hostile and exclusive".

Restatement of the Law of Property (adopted and promulgated by the American Law Institute) Vol. 5, entitled "Servitudes" in Sec. 457, at page 2923, defines "Creation of Easements by Prescription" as follows:

"An easement is created by such use of land, for the period of prescription, as would be privileged if an easement existed, provided the use is:

"(a) Adverse, and

"(b) For the period of prescription, continuous and uninterrupted".

It is to be noted that the Restatement definition does not include the term "hostile". Appellants contend that appellees' use was not adverse because of the lack of hostile intent. In this connection, appellees stress the fact that the appellees owning the five houses fronting on North Carolina Avenue made use of the subject right of way with the thought in mind that such use was a matter of right under a deed creating a right of way, and that the use of the right of way was made by the owners of the apartment building with the thought in mind that such use was a matter of right.

The question thus presented is whether use based upon an honest mistake is adverse for purposes of prescription, or, in the alternative, is it necessary that such use be accompanied by a subjective, hostile intent to commit a wrong? Is the law to favor one who acts with a deliberate hostile intent to commit a wilfull wrong over one who acts under an honest mistake? These issues have long been resolved in the District of Columbia.

In the case of *McMillan v. Fuller*, 41 App. D.C. 384, the party claiming prescriptive rights had no hostile intent to commit the wilfull wrong. In the mistaken belief that he was entering upon his own property under circumstances where in fact he had acquired title to the adjoining lot, he constructed a house, fenced the lot and occupied the same as his home for the period of prescription. The appellant claimed that adverse use requires hostile intent which was not present. Judgment was entered for the defendant on the basis that he had acquired by prescription title to the property and the complaint of the owner of record for simple title for ejectment was dismissed. This court affirmed the judgment and stated as follows at page 390:

"We are of the opinion that the possession was adverse within the meaning of the statute. *Johnson v. Thomas*, 23 App. D.C. 141, 150. In that case it was said:

'Certainly it is well established law that if a man goes upon the land of another whether he does so by honest mistake, upon the supposition that it is his own, or with the deliberate purpose of appropriating to himself that which is the property of another, and occupies exclusively and adversely to all the world for a period of 20 (now 15) years or upwards, he may by such adverse occupation acquire a complete title in himself. This is elementary doctrine in the law of adverse possession; and most assuredly greater consideration is due to a title by adverse possession based upon honest mistake than to one based upon deliberate and wilfull wrong.'

See also *Rudolph v. Peters*, 35 App. D.C. 438, 447, Ann. C. As. 1912 A 446."

In *Johnson v. Thomas*, *supra*, this court affirmed a judgment for adverse possession whereunder the plaintiff was entitled under will to eight acres of land and by mistake used eleven acres.

In the case of *Rudolph v. Peters*, *supra*, the party claiming title by

prescription had acquired title to 10 acres by deed and had by honest mistake, and without hostile intent to deliberately commit a wrong, occupies an area in excess of 10 acres. This court held that such honest mistake was "adverse" for purposes of prescription under the law of the District of Columbia.

Clearly, then, "hostility" is not a necessary element of prescription under the law of the District of Columbia.

Additionally, the trial court did not commit reversible error by entering a judgment for an easement by prescription based upon findings of fact and conclusions of law that the use was actual, continuous, adverse, open and notorious for a period of 15 years, without specifically including the term "exclusive". In defining "the creation of easements by prescription", Section 457 of the *Restatement of the Law of Property*, quoted above, does not include the term "exclusive". While exclusiveness is a necessary element to obtaining title in fee simple by adverse possession, there is a fundamental difference between the acquisition of fee simple title by adverse possession and the acquisition of an easement by adverse use. An easement is an interest in land in the possession of another which entitles the owner of such interest to a limited use or enjoyment of the land in which the interest exists (see *Restatement, Property, supra*, Sec. 450, at page 2901). For an adverse use to ripen into an easement by prescription, it is not necessary that the adverse user completely dispossess the owner of the fee simple title. Stated another way, in order to establish an easement by prescription, it is not necessary that the adverse user exercise any greater dominion over the land belonging to another than would be involved in the easement after it is created. This is clear from the language of the *Restatement, Property*, Sec. 450, comment that:

"An easement is created by such use of land, for the period of prescription, as would be privileged if the easement existed ***."

Looking then to the facts in the case before this court, had the use by appellees of the subject 12 foot strip been "exclusive", appellees would have been entitled not only to an easement by prescription, but additionally to fee simple title based upon adverse possession. The cases of *Reid v. Anderson*, 13 App. D.C. 30 (1890), *Doswell v. DeLa Lanzo*, 20 How. 29, 15 L.Ed. 824 (1858), *Bradshaw v. Scott*, 14 App. D.C. 527 (1894) and *Ward v. Cochran*, 150 U.S. 597 (1893) cited in appellants' brief, page 40, all involved the acquisition of fee simple title by adverse possession, and are distinguishable on that basis.

While this court in the case of *Umhau v. Brazzuro*, 76 U.S. App. D.C. 394 at 396, 133 F.2d 356 (1942) defined "effective user to establish a prescriptive easement" to include the term "exclusive", exclusiveness was not an issue in that case, and this court cited as the source for the definition *Reid v. Anderson*, *supra*, which, as shown above, was a case concerned with fee simple title based upon adverse possession.

Appellant's brief on page 40, cites as additional authority *Powell on Real Property*, Vol. 6, Sec. 1026, 759. But in addition to the portion quoted by appellants, *Powell on Real Property*, also states as a part of the same quotation in connection with easements by prescription:

"The nature of the interest claimed under a prescription dispenses with the necessity for an 'exclusive' use".

It is, therefore, clear that it was not necessary for appellees, in establishing an easement by prescription, to preclude any and all concurrent uses.

ARGUMENT II

Evidence in this case fully supports trial court's findings that use of the right of way was actual, continuous, adverse, open and notorious for the applicable period of 15 years.

Julia Connor was 37 years of age, Mary Connor was 35 years of age, Dorothy B. Grigsby was 32 years of age, and Curley Boswell was 16 years of age in 1924 when the subject garages were constructed, the easement paved, and the gate cut through from the apartment house to the subject right of way area. These three appellees and Mr. Boswell, a witness of appellees, were intimately acquainted with all facts and circumstances respecting all of the properties which are subject to this appeal from 1924 to date. Their testimony respecting the actual, continuous, adverse, open and notorious use of the subject right of way area for general alley purposes for the use and benefit of Lots 800, 66, 65, 64, B and 46 from 1924 through the expiration of the prescriptive period of 15 years which expired on July 25, 1939, is absolutely unrefuted by any testimony in this case whatsoever. Moreover, on the basis of their undisputed testimony, the period of prescription expired and title to the subject easement vested 12 years prior to the date appellants acquired title to Lot 848, 18 years before appellants moved into Lot 848, and 24 years prior to the date appellants took title to Lot 849. Two other witnesses, whose knowledge does not date all the way back to 1924, namely, Maureen T. Horton and Dorothy Grigsby Winters, testified that the subject 12 foot right of way was used for general alley purposes for the period commencing in 1937 when Maureen Horton moved into the house located upon Lot B and when Dorothy Grigsby Winters moved into the house located upon Lot 800. Based upon their testimony alone, the period of prescription would have expired in 1952, 5 years before appellants moved into Lot 848 and 11 years prior to the date appellees acquired title to Lot 849.

An additional 15 year period of prescription could be measured from the date Lydia Meaders, appellants' predecessor in title, ac-

quired title to and occupied as her residence Lot 848, namely August 3, 1945. Such 15 year period commencing with Meaders, expired on August 3, 1960. It should be specifically noted that even this third alternate 15 year period of prescription expired, and title to the easement vested, prior to the appellants' letter to appellee Gruis dated December 6, 1960, referred to in appellants' brief, page 44 (Ds' Ex. No. 11). It is clear from the testimony that the subject uses of the 12-foot right of way were made without the consent of Lydia Meaders, (J.A. 69-70). This is additionally corroborated by the testimony of Tillie Chidakel, predecessor in title to the apartment house located upon Lot 46, and by the testimony of John R. Perry of the real estate firm of Hohenstein Brothers and Donohoe, who handled the management of the apartment house located upon Lot 46 for Reed Liggitt, a successor in title to Tillie Chidakel. Each of these witnesses specifically testified that the subject use of the right of way was not with permission or consent of the owner of Lot 848 or Lot 849 (J.A. 83-b, 84 and 109).

The aforesaid actions and uses were taken without obtaining the consent at any time of any owner of said Lots 848 and 849 (Gruis Supp. Aff. J.A. 27; Grigsby J.A. 52-53; Meaders J.A. 70; Chidakel J.A. 83-b-84; M. Connor J.A. 89; J. Connor J.A. 94-95; Horton J.A. 101; Perry J.A. 109; Boswell J.A. 113; Gruis J.A. 125; T. Ishee J.A. 178).

On the basis of uncontradicted testimony of numerous witnesses, appellees established all of the necessary elements of prescription during three separate periods -- one beginning in 1924, one beginning in 1937, and one beginning in 1945. Hence, there is no basis for appellants' contention that the finding of the trial court that the use of the subject right of way was actual, continuous, adverse, open and notorious for a period of 15 years was clearly erroneous.

Appellants challenge the continuity of the adverse use with regard to the apartment house located on Lot 46 on the theory that a tenant's

use and possession is not that of his landlord. In support of such contention, appellants cite *Umhau v. Brazzuro, supra*, where the ruling of the court was based on the following pertinent facts: (a) The use by the tenants was merely "occasional" (p. 395), (b) "Appellants rely solely upon the acts of the successive tenants", and (c) "The tenants often asked permission to traverse the way" (p. 396).

With regard to the facts in this case: (a) Use by tenants of Lot 46 was not occasional, but continuous; and (b) appellee Gruis does not rely solely upon the acts of successive tenants. In addition to ingress and egress by tenants, the subject right of way was continuously used for the period of prescription for fuel oil deliveries, collection of garbage, collection of trash, and as a service entrance for the apartment house. There is no evidence that the tenants asked or received permission for such use at any time during the period of prescription.

Moreover, this court has subsequent to the *Umhau* case adopted the rule that the tenant's possession is that of his landlord. In *Bonds et al v. Smith*, 79 U.S. App. D.C. 118, at page 120, 143 F.2d 369 (1944), this court stated as follows:

"In the case of easements, as is true of acquisition of title by adverse user, generally, the privity which is necessary to permit tacking may be of estate, blood or contract. A devisee can tack his possession to that of his devisor; the tenant's possession is that of his landlord."

This later opinion of this court is further supported by the sound reasoning of the *Restatement Property, supra*, Sec. 464, Comment (a), as follows:

"* * * The relationship necessary to constitute privity may arise not only through succession by the later use to the interest of the prior user but also from the fact that both uses are made under a common source of title. Thus, a landlord may add to his period of adverse use the period of adverse use of his tenant * * *".

Similarly, *Burbee, Real Property*, (Hornbook Series) Sec. 72, (1943), pages 92 and 93 states:

"There is some authority, however, that the adverse claim of the leasee will not inure to the benefit of his lessor unless the alleged easement or profit was included in the terms of the lease. This conclusion is open to question: Since the controlling element is the denial of the right of the servient owner, the extent of the denial should be determinative of the extent of the right acquired".

ARGUMENT III

The issue of the validity of the deed creating the right of way was properly determined to be moot.

The trial court did not commit reversible error by including, after finding facts and adopting conclusions of law, that an easement appurtenant to the land of all appellees was established by prescription, that the issue of the validity of a 1919 deed which created a right of way with respect to some but not all of appellees, was moot. By reason of the fact that properties of all appellees were not included in said deed, it was necessary that the court fully hear all evidence pertaining to prescription. It has been the law of this jurisdiction since 1908 that title by prescription is as perfect as title acquired by deed from the record owner. *Scott v. Herrell*, 31 App. D.C. 45, 53, at page 11908.

Therefore, it was not necessary, and, indeed, superfluous for the court to look behind the easement created by prescription to determine the various questions which appellants attempted to raise below with respect to the validity of the deed.

It should be specifically understood, however, that appellees at no time conceded below that the subject deed was invalid, and, in the event that this court should determine that there is no easement by prescription over all or any part of the subject right of way, appellees request that this court rule that said deed was valid. In this connection, it should be briefly noted that in *Equity Case No. 34055 in the United States District Court for the District of Columbia*, the deed

creating the right of way, dated January 9, 1919 (Ps' Ex. No. 2, J.A. 248-250), was followed by a trustees' report to the court bearing the written consent of all parties concerned (J.A. 271-272), and was made pursuant to an order of the District Court ratifying and approving the sale (J.A. 273).

ARGUMENT IV

The use created an easement appurtenant and not an easement in gross.

Appellants contend that the subject use of the right of way creates an easement in gross. *The Restatement, Property, supra*, Sec. 454, at page 2917, defines "Easement in Gross" as follows:

"An easement is in gross when it is not created to benefit or when it does not benefit the possessor of any tract of land in his use of it as such possessor."

Appellees respectfully submit that the subject use created an easement appurtenant. *The Restatement Property, supra*, Sec. 453, at page 2914, defines "Easement Appurtenant" as follows:

"An easement is appurtenant to land when the easement is created to benefit and does benefit the possessor of the land in his use of the land."

The facts in this case clearly show that the subject easement is for a 12-foot right of way which abuts the properties of all appellees and was used by appellees and their predecessors specifically in connection with their respective ownership and occupancy of Lots 800, 66, 65, 64, B and 46. Ingress and egress to and from the public alley over the subject right of way was directly to and from said Lots 800, 66, 65, 64, B and 46. Trash collection, garbage collection, and fuel deliveries over said right of way were directly to said lots. It would be impossible to visualize a set of circumstances under which an easement could conceivably be more appurtenant and less in gross. *Tiffany, Real Property* (3d Ed.), Vol. 3, Sec. 758, at pages 203-204, describes an easement appurtenant as follows:

"An easement ordinarily exists for the benefit of the owner of some particular land, it belonging to him as an incident of his ownership of the land. In other words, there is not only a 'servient' tenement, subject to the easement, but also a 'dominant' tenement, in favor of which the easement exists. This type of easement is generally referred to as being 'appurtenant' to the dominant tenement, and it must be such that it conduces to the beneficial use of such tenement. For instance, one cannot have a right of way over another's land, appurtenant to one's own land, *except as it is available for going to or from the latter land.* (Emphasis supplied)"

ARGUMENT V

A tax deed to a lot over which lies an easement to other lots does not extinguish the easement.

A tax deed to a lot over which lies an easement created by prescription and appurtenant to other lots does not extinguish the easement.

There can be utterly no question about the fact that under the law of the District of Columbia, a tax deed to a lot over which lies an easement created by deed and appurtenant to other lots does not extinguish the easement. *Engel v. Catucci*, 91 U.S. App. D.C. 54, 197 F.2d 597 (1952). While this court in the *Engel* case did not have before it an easement created by prescription, this court did not say that the rule of the *Engel* case would not apply to easements created by prescription, and a careful consideration of the reasoning of this court in adopting the rule *Engel* case clearly shows that it should apply to easements created by prescription. The court in that case stated in pertinent part (commencing at page 56):

"The reasoning of the authorities holding that the easement survives the tax deed is, briefly, that when an easement is appurtenant to a dominant estate, it attaches to that

estate, being carved out of the servient estate; that the value of the dominant estate is increased by the existence of the easement and in effect thus includes the value of the easement; that, when a tax is paid upon the value of the dominant estate determined in this manner, a tax has in effect been paid upon the easement; that the tax upon the servient estate is upon the value lessened because of the existence of the easement; that a sale for non-payment of that tax ought to be a sale of the lessened estate; that 'account can be taken of an easement appurtenant without increasing the complication of the tax process'; and that, therefore, a tax sale of a servient estate should pass title to that estate subject to the easement. * * * It is true * * * that in the District of Columbia a tax deed extinguishes all liens, encumbrances and equities in and upon the parcel conveyed. But an easement is an interest in land which has peculiar characteristics of its own, being neither an estate nor a lien, an encumbrance nor an equity, in the ordinary sense of those terms. An easement appurtenant to another lot, when created by conveyance, attaches to the possession of that other lot and 'follows it into whatsoever hands it may come'. * * * 'The appurtenant easement' as the restatement says, 'presents a situation which calls for exceptional treatment'. An easement which lies within one lot that is appurtenant to another lot is really part of the latter. It is carved out of the former."

It is to be noted here, equally, that an easement appurtenant to another lot, created by prescription, attaches to the possession of that other lot and follows it into whosoever hands it may come, to the same extent as an easement created by deed. As stated above, it has been the law of the District of Columbia since 1908 that title by prescription is as perfect as title acquired by deed from the record owner. In *Scott v. Herrell, supra*, at page 53, this court stated as follows:

"Mrs. Ball having occupied these lots adversely for 20 years (now 15 years), all right of plaintiffs' predecessor in title was extinguished, and the title in Mrs. Ball was as perfect as though she had produced a deed in fee simple from the true owner * * *".

It is, therefore, clear that in the words of this court in the *Engel* case, when read together with the words of this court in *Scott v. Herrell, supra*, that an easement appurtenant created by prescription is carved out of the servient estate, and that the value of the dominant estate is increased by the existence of the easement, and that the tax thereupon includes the value of the easement, and that the tax upon the servient estate is based upon a value less because of the existence of the easement.

It should be specifically noticed that the *Restatement of Property*, relied upon heavily by the court in the *Engel* case, makes no distinction between easements created by deed on the one hand and easements created by prescription on the other hand. The *Restatement of Property* draws the line, as recognized by the court in the *Engel* case that a tax deed extinguishes an easement in gross and not an easement appurtenant. Section 509 of *Restatement, Property, supra*, entitled "Tax Deed", states as follows:

"(1) In the absence of a separate authorized tax upon it, an easement in gross is extinguished by a sale and conveyance of the land subject to it for nonpayment of a tax assessed against such land.

"(2) An easement appurtenant is not extinguished by a sale and conveyance of the land subject to it for nonpayment of a tax assessed against such land."

Similarly, *Burbee, Real Property, supra*, Sec. 92, at page 114 states:

"Under the prevailing rule, the sale of a servient tenement pursuant to a default in the payment of taxes assessed against that land does not extinguish a profit or easement. The tax assessment against the servient tenement does not contemplate a levy against the easement or profit. This is true even where the local statute expressly provides that a tax deed passes the absolute title 'free from all encumbrances'."

This court in *Engel v. Catucci, supra*, cited with approval *District of Columbia v. Capital Mortgage & Title Co., Inc., et al*, 84 F.Supp. 788, (1949), where Judge Holtzoff in his opinion carefully analyzed the majority view prevailing in the United States to the effect that an easement is not destroyed by a sale of the servient estate for nonpayment of taxes and the minority view, and concluded at page 790 as follows:

"This Court is impelled to the conclusion that the majority view is preferable, both on principle and authority. Accordingly, this Court holds that an easement is not extinguished by the sale of the servient tenement for nonpayment of taxes * * *. The opposite rule would be extremely unfair and unjust. * * * Surely it could hardly be expected that the defendants should come in and pay taxes on the adjoining property merely in order to reserve their rights of way over it. * * * In the light of the foregoing discussion the Court concludes that an easement appurtenant is not extinguished by a sale of the servient estate for nonpayment of taxes."

The *Capital Mortgage & Title Co., Inc.* case may or may not have involved an easement created by prescription. It is not clear from the facts as stated by the court. However, it should be specifically noted that the rule laid down by Judge Holtzoff in that case makes utterly no distinction between easements created by prescription and easements created by conveyance. Logically, then, it must be assumed that the District of Columbia in assessing properties throughout the District of Columbia has made no such distinction.

ARGUMENT VI

Fee simple title did not vest in the District of Columbia so as to preclude the establishment of an easement by prescription under the theory that prescription will not lie against the sovereign.

Fee simple title does not vest in the District of Columbia when it bids the amount of taxes, penalties and costs due so as to comply with the Act of Congress that no tax sale be made for a lesser amount.

Under the law of the District of Columbia, all real property must be assessed in the name of the owner (Title 47, D.C. Code, 1961 Ed., Sec. 47-701). Additionally, property owned by the District of Columbia is exempt from assessment and taxation (Title 47, D.C. Code, 1961 Ed., Secs. 47-801a(b)). While the District of Columbia successively bid in at the tax sale on Lot 849 in order to avoid a sale for less than the taxes in default, plus interest and penalties, it continued thereafter each successive year to assess the property in the name of the owner (Ps' Ex. No. 43, J.A. 280-281). Additionally, Congress has specifically required that the property so bid off shall not be exempted from assessment and taxation, but shall be assessed and taxed as other property. The Congressional intent is clear from the foregoing, that title does not vest in the District of Columbia under such circumstances. A contrary conclusion would result in the most unfortunate circumstance in that the District of Columbia would be liable for tort claims pertaining to all properties involved in tax sales where no bidder submitted a bid sufficient to meet taxes, penalties and costs, and the District of Columbia would additionally be precluded from enforcing housing regulations and other municipal ordinances against the owners of tenements, slums and other properties under similar circumstances. Furthermore, since 1918 it has been the law of the District of Columbia that until execution of a tax deed, a purchaser at a tax sale acquires no title to the property. *Hall v. District of Columbia*, 47 App. D.C. 552, at page 557 (1918).

Additionally, notice should be given here to the title report of Realty Title Insurance Company, Inc., which reported title to Lot 849 from January 1, 1924 through December 31, 1941, was vested, according to the records, in Lee Walsky, and the tax title was (Ps' Ex. No. 42, J.A. 278) as of December 31, 1941 (July 25, 1939 being the expiration date, the first of the three alternate periods of prescription claimed by appellees)outstanding in Gray Properties, Inc.

In view of the foregoing, it clearly appears that fee simple title was not vested in the District of Columbia so as to preclude the establishment of an easement by prescription under the theory that prescription will not lie against a sovereign.

ARGUMENT VII

Appellants cannot, by purchasing a tax deed while litigation is pending, having theretofore participated concurrently with appellees in the use of Lot 849, and having theretofore admitted by various deeds the establishment of a right of way over Lot 849 by 1919 deed, defeat appellees' right of way on the ground that the District of Columbia seven years after the visible use commenced, had a tax lien from 1931-1939.

The tax deed involved in this case pertains to that portion of the right of way on Lot 849 which abuts the public alley, consisting of the west 8 feet of the subject 66.1 foot right of way which is 12 feet in width. For many years prior to the erection by appellants of the barricades, giving rise to the necessity of filing this action, appellants and appellees both used that part of the right of way located upon Lot 849 which was then owned by Gray Properties, Inc. (Ps' Ex. No. 42, J.A. 278). After the barricades were removed under the order of Judge Pine and the preliminary injunction was issued against appellants by Judge Youngdahl, appellants acquired the tax deed to Lot 849.

The 1919 deed (Ps' Ex. No. 2, J.A. 248) which contained a provision for the 12 foot right of way, the validity of which is contested by appellants, specifically covered this Lot 849. The evidence presented by appellees clearly establishes this fact. The 1898 survey (Ps' Ex. No. 41) shows that original Lot 18 fronted 64.2 feet on D Street. The 1919 deed conveyed "all of original Lot 18 in Square 734 except the west 8 feet front by the depth thereof subject to a right of way over the rear 12 feet thereof for the benefit of original Lot 2 and sub lot B in said Square." It, therefore, appears that the right of way area referred to in said deed was 64.2 feet (the entire width of Lot 18) minus 8 feet,

leaving a balance of 56.2 feet. Appellants' Lot 848 is 48.17 feet (Ps' Ex. No. 4, J.A. 251). The sum of the frontage of appellants' Lot 848 and that of Lot 849 is 56.2 feet (Ds' Ex. No. 25) which is the same 56.2 feet covered by the easement referred to in the 1919 deed (Ps' Ex. No. 2, J.A. 248). Appellants have argued that the 8 feet excluded from the 1919 deed was Lot 849, which is clearly incorrect. This is further substantiated by the fact that the deed conveying the property west of Lot 849 to Bridwell (Ps' Ex. No. 44, J.A. 283) specifically includes a portion of original Lot 18. Appellants are apparently confused by the fact that there are two 8-foot strips, one carved out of the 64.2 foot frontage of original Lot 18, because Duff did not own it, and the second 8-foot strip carved out in the formation of Lot 849, leaving 48.17 feet frontage in Lot 848. Appellees' position is further substantiated by the title report on Lot 849 by Realty Title Insurance Company, Inc. (Ps Ex. No. 42, J.A. 278) which specifically states in the last paragraph thereof: "Subject to a right of way over the rear 12 feet thereof for the benefit of original Lot 2 and subdivision Lot B in said square."

The oldest of appellees' three alternate periods of prescription commenced in 1924, and 15 years expired in 1939. Real estate taxes were not paid on Lot 849 for 9 of those years, 1931 - 1939 (Ps' Ex. No. 43, J.A. 280).

The public alley within the square was condemned from First Street eastwardly through the square to the west line of Lot 849 in 1910 (See Ps' Ex. No. 53, plat of Surveyor in District Court Docket No. 844). The rear 12 feet of Lot 849 was paved coincident with the paving of the right of way over the rear 12 feet of Lot 848 in 1924 when the garages were constructed on certain properties of appellees. Many of the photographs introduced in evidence (e.g., Ps' Ex. Nos. 21, 22, 31, 34) in this case show the condition of that paving after 38 years of use for general alley purposes.

Appellants contend that the application of the rule of *Engel, supra*,

to the case now before the court would increase the complication of the tax process, but this court in that case specifically stated as follows, at page 57:

"The tax authorities are required by statute to view the property being assessed (citing D.C. Code, Sec. 47-205, now 47-705). Too much difficulty would not seem to be involved, when this easement is visibly one of the elements of value of the row lots."

Compare a tax assessor's difficulty in determining an inchoate dower right in *Cobb v. Shore*, 87 App. D.C. 162, 183 F.2d 980 (1950), and a junior tax lien in *Cobb v. United States*, 84 App. D.C. 228, 172 F.2d 297 (1949), cited by appellants as contrary authority.

Under the facts before the court in this appeal, what could be more visible than a right of way which constitutes a direct extension of a public alley, which is paved and which is directly in front of the garage of appellee Grigsby located upon Lot 800.

Appellants attempted to show that, while the right of way may have been clearly visible, the representative from the Assessor's Office, Mr. Hall, when he made the view required by law happened to overlook it. While Mr. Hall apparently overlooked eight recorded instruments which referred to the subject right of way over Lots 848 and 849, and apparently overlooked the fact that the right of way was in use, the evidence shows his inspection was in connection with taxes for the fiscal year 1964 (Hall J.A. 241), which is entirely irrelevant for purposes of this case. Moreover, a rule of law should be based upon what the representative of the Assessor is required to do and should not vary in each case on the basis of what the Assessor did or did not happen to take into consideration. In this connection, the Assessor is obligated to assess each property at its full and true value (D.C. Code 47-713, 1961 Ed.). It is clearly the law of the District of Columbia that an easement appurtenant is carved out of the servient estate and that the value of the dominant estate is increased by the existence of the ease-

ment, and that, the value of the dominant estate includes the value of the easement. *District of Columbia v. Capital Mortgage & Title Co., supra*; and *Engel v. Catucci, supra*. This court in *Engel v. Catucci, supra*, stated as follows:

"The full and true value of the row lots was undoubtedly increased and the full and true value of Lot 806 decreased by the existence of the easement. The record indicates that this was true as to Lot 806, since it shows that the lot was bid in by the District at about 2¢ a square foot, a nominal price."

The subject tax deed (Ps' Ex. No. 43, J.A. 279-282) shows that it was based upon taxes from the second half of fiscal year 1930 through fiscal year 1963 (the year before Mr. Hall's appraisal was applicable). It shows that Lot 849 was bid in by the District for amounts ranging from \$9.81 (for the 784 square feet) to \$31.95, or from 1¢ per square foot for the lowest bid to 4¢ per square foot for the highest bid. We respectfully submit that 1¢ to 4¢ per square foot between 1930 and 1963 is "nominal" within the meaning of 2¢ per square foot as stated by this court in the Engel case in 1952.

It is an important factor in the case now before this court that, over and above the clearly visible use of the subject right of way, there were, in fact, recorded among the land records of the District of Columbia, eight instruments referring to the subject right of way. The deed by which appellants took title to Lot 848 specifically provided "Subject to a right of way over the rear twelve (12) feet thereof for the benefit of Original Lot Two (2) and Subdivision Lot B in said Square" (Ps' Ex. No. 4, J.A. 251). Appellants moreover, acknowledged the existence of the subject right of way by conveying to trustees, as security for loans, specifically subject to the right of way, namely by a deed of trust dated November 30, 1951 and recorded on December 1, 1951 as instrument No. 51675 among the land records of the District of Columbia, and by a deed of trust executed by defendants dated May 1,

1956 and recorded on May 1, 1956 as instrument No. 14717 among the land records of the District of Columbia (See allegation in Appellees' complaint, J.A. 3, admitted by defendants' answer, J.A. 6). Appellants are estopped from denying that which they have heretofore admitted under the aforesaid instruments duly executed by them under seal and duly acknowledged and recorded.

Additionally, appellants, having joined with appellees in using Lot 849, when it was the property of Gray Properties, Inc., as a right of way for alley purposes, (T. Ishee J.A. 162, 178) including but not limited to ingress and egress, garbage collection, trash collection, fuel oil deliveries, and for vehicular access, are now estopped from asserting by reason of the acquisition of a tax deed after the commencement of this suit that appellants may continue such use and appellees may not do so.

ARGUMENT VIII

Court did not commit reversible error in finding as an unreasonable obstruction of appellees' use and enjoyment of right of way, appellants' erection of heavy oak posts and fencing along and over right of way, the almost daily parking of a car in the right of way and the planting of trees or shrubs, and the erection of a chicken wire fence across the apartment house's opening onto the right of way.

Probably the most important factor to consider in connection with the issue as to whether or not the barricades constituted an unreasonable obstruction is the fact that the trial court found that the acts of the appellants were done "all with the intent and purpose of impeding, obstructing and otherwise interfering with the use by plaintiffs (appellees) of the subject right of way for general alley purposes" (J.A. 294).

Appellants make the astounding contention that barricades consisting of wooden posts and fencing constructed primarily of heavy oak, 4

feet in height, in six sections, each 8 feet in length, extending in a broken line approximately 48 feet along the west and southern boundaries of the easement, are merely gates and constitute a reasonable obstruction. Appellants rely principally upon *Preston v. Siebert*, 21 App. D.C. 405 (1903). In the *Preston* case the Supreme Court of the District of Columbia granted an injunction requiring the removal of gates as constituting an unreasonable obstruction, and the judgment of the District Court was affirmed by this court. In the *Preston* case, this court recognized the distinction between city cases and country cases, when it comes to the question of reasonableness of obstructions of rights of way, and on pages 413 and 414 the court in its opinion stated that in the country it is often necessary to fence in stock (horses, cows, pigs, etc.). This court in deciding that case in 1903, referred to the District of Columbia as a "large and growing city, where expedition is often a necessary concomitant of action". The court concluded in the *Preston* case at page 416, that the owner of the servient estate must yield to the convenience of the owner of the dominant estate "whose right in the premises is paramount". The distinction between country and city cases made by this court in 1903 is even more applicable today. For example, if the type and character of barricades erected by appellants (for example, see Ps' Ex. Nos. 40 and 45) were determined by this court to constitute reasonable obstructions of a right of way, then in the case of a right of way traversing a square similar to that involved in this case, owners of the 31 lots on the south thereof plus the owners of the 31 lots on the north thereof could each erect such structures and one traversing such right of way would be confronted with 62 of such obstructions. The court will take judicial note of the fact that rear access to hundreds of properties throughout the District of Columbia are dependent upon easements.

Reference here is made to the citations in the appellees "Counter-statement of the Case", which clearly show from the evidence that such barricades constituted an unreasonable obstruction.

The facts in this case are clearly distinguishable from the case of *Chenevert et al v. Larame*, 42 R.I. 426, 180 A 589 (1920), cited by appellants, which involved a light-weight gate over a foot path to a garden plot. The court also concluded in the *Chenevert* case the reasonableness of such obstruction is a question for the trier of the fact. In the case of *Sharp et al v. Silva Realty Corp.*, 134 A.2d 131 (R.I. 1957), cited by appellants in their brief, the Court held that the erection within a right of way of elevated ramps leading to garages constituted an unreasonable obstruction. The Court in the *Sharp* case additionally concluded that parking cars in the right of way constituted an unreasonable obstruction, a condition which the trial court also found to exist in this case now on appeal by the appellants almost daily parking of a car in the subject right of way (J.A. 294).

In *Preston v. Seibert, supra*, this court also stated:

"Assuredly, the highways and bi-ways of the world are not sodded; nor are the lanes and pathways over which pedestrians go. Sodding the highway or the footpath, while, perhaps, it is only a minor interference with it, is distinctly an act antagonistic to its usefulness as a highway or footpath, and an assertion of ownership inconsistent with the continued existence of the right of way."

Similarly, appellants' act of planting trees or shrubs in the right of way (J.A. 294) was distinctly an act antagonistic to its usefulness and an assertion of ownership inconsistent with the continued existence of the right of way.

Moreover, the act of appellants in nailing chicken wire across the gate leading from the right of way to the apartment located upon Lot 48 constituted not merely an unreasonable, but an absolute barrier. (Ps' Ex. Nos. 24 (Photos 4 and 5) and 29.)

Appellants cannot be heard to argue that the barricades were necessary to enclose their children, when, as shown above, appellants

themselves created their problem by removing the fences which had long stood along the north line of the subject right of way. (T. Ishee, J.A. 188-189; M. Ishee J.A. 215).

Appellants contend -- although the trial court refused to find -- that appellees abused the easement, which resulted in a forfeiture of the easements rights. Assuming, while denying that appellees abused the easement, it is well established under the laws of the District of Columbia that:

"Misuse of an easement right is not sufficient to constitute a forfeiture, waiver, or abandonment of such right" *Penn Bowling Recreation Center, Inc. v. Hot Shoppes, Inc.*, 86 App. D.C. 58 at page 60, 179 F.2d 64 (1949).

The case of *Marzo, et al v. The Seven Corners Realty, Inc. et al*, 171 F.2d 144 (1948) cited as support by appellants, involved solely the question of the creation of a right of way by implication based upon necessity and has no application whatsoever to the case bar, wherein an easement by prescription is involved, and in which "necessity" is not a necessary element.

Appellants' contention that the trial court committed error in granting an injunction against such unreasonable interference because of a lack of a showing of irreparable injury is without foundation. It is universally established "Hornbook Law" that an interest in the land is unique and has historically formed the basis of equitable relief under the theory of irreparable injury because there can be no adequate remedy at law.

ARGUMENT IX

Court did not commit reversible error under the facts and circumstances of this case in not implying permission for the use of the right of way, the erection of a fence in 1905, or the use of a one foot strip of appellants' land.

Under the law of the District of Columbia, "open and continuous use of another's land is commonly presumed to be adverse in the absence of evidence to the contrary", *Kogod, et al. v. Cogito*, 91 U.S. App. D.C. 284 at page 286, 200 F.2d 743 (1952). Appellants produced utterly no evidence that any permission was given during any one of appellee's three alternate periods of prescription. Appellants' contention that permission should be implied is without merit. As a basis therefor, appellant argues that permission should be implied when an owner and neighbors make common and mutual use of a roadway left open for general use. The transcript is void of any factual foundation for appellants' statement that any owner of Lot 848 or 849 left the 12 foot right of way open for general use.

Appellants also represent in their brief that the subject 12-foot right of way was but a part of a general "roadway" some "20-22 feet wide", which embraced the garage set back on Lots 800, 66 and 65 (Appellants' Brief, pages 3-4). However, the evidence in this case shows: (a) the erection of an 8 foot high fence in 1925 by Lee Walsky, predecessor in title to Lots 848 and 849, along the north line of the 12-foot right of way (T. Ishee J.A. 180; M. Ishee 213-214; Ds' Ex. No. 35), which was removed by appellants prior to the time they moved to Lot 848 in 1957 (T. Ishee J.A. 179; M. Ishee J.A. 215); (b) the erection by appellants in 1957 of a fence some 7 to 10 feet north of the north right-of-way line (T. Ishee J.A. 163, 172; M. Ishee J.A. 215); and (c) a distance of no more than a few feet between the barricades built by appellants along the rear of their property (south easement line) (T. Ishee J.A. 163) and the set back for the garages on Lots 800, 66 and 65

(Grigsby J.A. 54, 62; Ps' Ex. Nos. 19, 20, 22, 23, 24 [Photos 7 & 9] and 45). It is clear from the evidence, therefore, that the "20-22 feet wide" roadway was formed not by the width of the right of way and garage set back, but by the right of way and the 7 to 10 foot distance to appellants' fence built north of the north right of way line.

Appellants further contend that permission should be implied from the alleged fact that use of the right of way was not a burden to appellants' land, while at the same time contending that the erection of the barricades was reasonable in view of the burden imposed upon appellants. Appellants further contend that permission should be implied on the basis of a further implication that their predecessor in title, Lee Walsky, participated in the opening and paving of the subject 12 foot right of way. Lee Walsky was not found by anyone, and did not testify, and no one else testified that Walsky participated in either the opening of the right of way or in the paving. Appellants' proposed novel rule that implications should be based upon implications would set an unsound and dangerous precedent.

Appellants further argue that the trial court committed error in not implying permission from an agreement that appellants would have the court imply as having taken place between Lee Walsky and the owner of Lot 848 and the owners of Lots 800, 66 and 65 under the provisions of which Walsky gave permission to use the 12 foot right of way in consideration of the latter setting back the garages south of their north property lines. This is another instance of appellants urging the court to adopt an implication on the basis of an implication that does not exist in fact. The record is void of any evidence of such agreement with Walsky. What facts are to be inferred from the circumstances, if any? The fact is that at the time of the erection of the garages, the 1919 deed creating the 12 foot right of way was five years old. Aside from the question of the validity of the deed, the owners of the three lots upon which the garages were constructed knew of the existence of

the 1919 deed which purported to create the right of way. Additionally, the court will take judicial notice of the fact that it is common practice in many instances throughout the District of Columbia for a property owner to set his garage back from the alley line to permit ample space for maneuvering in and out of the garage onto the right of way. Certainly it is not to be implied under circumstances where the owners who constructed garages felt that they had an existing right of way by deed that they entered into an agreement with Walsky to set back the garages so that they could in return gain access to a right of way which they believed was theirs by deed.

After appellees were required to file this action to require appellants to remove the barricades, appellants counterclaimed for damages against appellee Gruis for replacing the old fence constructed by McCray in 1905, the time he build the Folger Apartments, with a new cedar screen fence. The trial court dismissed this counterclaim by appellants because title to the fence erected in 1905 and the one foot strip which it embraced within the rear yard of the Folger Apartments had vested in appellee Gruis and his predecessors in title after the 15 year period of prescription which expired in 1918. Appellants now attempt to resurrect their claim for damages for the removal of the old fence and the erection of the new fence on the theory of implied permission. As a basis for the implied permission, appellants contend that when McCray constructed his back yard fence in 1905, he was unable to place it within his rear property line because a tree then stood on the line, and then argue that from such circumstance, an agreement should be implied under which McCray saved the tree by placing the fence one foot to the west of his line so that the adjoining owners could enjoy the tree's shade.

Let's look at the facts. It is undisputed that the old fence was one foot to the west of the west line of the apartment located on Lot 46. It is additionally undisputed that the new cedar screen fence erected by

appellant Gruis as a replacement thereof is approximately one foot to the east of where the old fence stood, or, approximately on the record title line dividing Lots 848 and 46. Ps' Ex. Nos. 37 and 39 show the new cedar screen fence and a string tied to points set by the Surveyor of the District of Columbia to locate the record title line between Lots 848 and 46. This shows the new cedar screen fence at the point closest to the old tree to be just inside the record title line of the apartment located on Lot 46. The location of the old grey fence erected by McCray in 1905, and the location of the tree before and after it was cut down is shown by Ds' Ex. Nos. 10, 14 and 15. From these photographs, there is no question that the old tree stood well within Lot 46 from the old fence. From the foregoing, it is clear that even after 58 years growth of the tree, it had not even extended westward to the record title line dividing Lots 848 and 46. The tree could not under any circumstances have constituted an obstacle to McCray in constructing the old fence in 1905 within his record title line. Therefore, there are no facts upon which to base implied agreement.

Appellants further contend that the trial court committed error in implying permission from alleged friendship. While the record abounds with testimony of the blood relationship and friendship among the adverse users, the record is void of any evidence of friendship between Lee Walsky who owned Lot 848 from December 19, 1923 to August 3, 1945 on the one hand, and the adverse users on the other hand. As a matter of fact, none of the appellants had ever met Lee Walsky. Additionally, there was utterly no evidence of friendship between Meaders who owned Lot 848 from August 3, 1945 to November 30, 1951, and the adverse users. With respect to the fence between Lots 848 and 46, there is utterly no evidence of friendship between McCray and Daniel Allman, Sr. at the time of the erection of the fence in 1905 or thereafter.

The trial court committed no error in not implying permission under the facts and circumstances of this case.

ARGUMENT X

Court did not commit reversible error in finding title in appellant Gruis to a fence constructed in 1905 enclosing as a part of the rear yard of the apartment house a one foot strip of appellants' Lot 848, or in dismissing the counterclaim for damages for replacing said fence.

When McCray constructed the apartment house on Lot 46 in 1905, he enclosed the back yard by a fence which was erected one foot to the west of and parallel to his rear property line (J.A. 49 and 53). Appellants contend that the construction of a structure on the property of another person vests title to such structure in the other party. This would certainly be true in the absence of prescription. If such construction is followed by prescriptive possession, however, the structure becomes the property of the person who erected the same on date of expiration of the period of prescription.

In the case of *McMillan v. Fuller, supra*, the defendant constructed a house on land belonging to another, thinking that he was entering upon his own property. If the owner of the property upon which he had mistakenly constructed his house had thereupon claimed the house, and taken possession of it, the owner of the lot would have prevailed. When the period of prescription expired, however, it became his property. The same applies to McCray's fence, and to the one foot strip of Lot 848, which it enclosed within the back yard of Lot 46. In 1920, when the first alternative period of prescription had expired, title to the land upon which the fence stood vested in the ownership of Lot 46 by adverse possession. Title having vested in the ownership of Lot 46 in 1920, minor repairs to the old fence by appellants on a couple of occasions commencing over 37 years thereafter (appellants moved into premises on Lot 848 in 1957) was utterly immaterial. Appellants could not have procured title to the fence by prescription during the 6 year period from 1957 to 1963.

While actual enclosure is not absolutely necessary in order to obtain title by adverse possession, actual enclosure by a fence is the clearest type of evidence of adverse possession. Possession of a back yard enclosed by a fence is the clearest evidence of "actual" possession, is the clearest evidence of "continuous" possession, is the clearest evidence of "adverse" possession, and is additionally, the clearest evidence of "notorious" possession. *Powell, Property, supra*, Sec. 1018 at page 732, states as follows with respect to adverse possession:

"Finding the claimant to be in occupation suffices; enclosure is a significantly open and visible act."

See also *Johnson v. Thomas, supra*, and *Rudolph v. Peters, supra*.

It is especially important to note that the paving of the rear yard of the apartment located upon Lot 46 extended westwardly to the old fence constructed by McCray (Ps' Ex. No. 33 and Ds' Ex. No. 14), which concrete had to be chipped away in the erection of the new cedar screen fence by appellee Gruis one foot to the east of the old fence (Ps' Ex. No. 46).

Therefore, the court did not commit reversible error in finding that fencing constructed in 1905 enclosing as a part of the rear yard of the apartment house, the rear of Lot 46 plus a part of Lot 848 one foot west of the rear record title line of Lot 46, resulted in the establishment of title to said fence and said one foot strip in the owner of the apartment house by adverse possession, to the end that the replacement of said fence in 1963 was a matter of right, as distinguished from actionable wrong, or in dismissing appellants' counterclaim for damages for the removal of said old fence.

CONCLUSION

Appellees respectfully urge on the basis of the foregoing, that the judgment be affirmed.

Respectfully submitted,

JAMES C. WILKES, JR.

500 Tower Building
1401 K Street, N.W.
Washington, D.C.

Attorney for Appellees

APPENDIX

Identification of Lots and Documents or Evidence in Support of Opposite P L A T

Lot 848, 149 D Street, S.E., owners: Appellants T & M Ishee
Lot 849, (Tax Deed) owners: Appellants T & M Ishee
Lot 850, 147 D Street, S.E., owners: Lowell Bridwell & Spouse
Lot 46, 409-411 2nd Street, S.E., owner: Appellee Gruis
Lot B, 176 N. Carolina Ave., S.E., owner: Appellee Norton
Lot 64, 174 N. Carolina Ave., S.E., owner: Appellee Schreiber
Lot 65, 172 N. Carolina Ave., S.E., owner: Appellees M & J Connor
Lot 66, 170 N. Carolina Ave., S.E., owner: Appellees M & J Connor
Lot 800, 160 N. Carolina Ave., S.E., owner: Appellee Grigsby

#

Documents & Evidence of Record

Public Alley & diminisions: Ps' Ex. Nos. 19, 24(Photo 8), 28, 32, 40, 52
and 53 (District Court Docket No. 844); Ds' Ex. No. 23

Lot 848 - improvements & diminisions: Ps' Ex. Nos. 3, 4, 38, 41, 53;
Ds' Ex. No. 25

Lot 849 - improvements & diminisions: T. Ishee J.A. 161; Ps' Ex. Nos. 2,
3, 4, 15, 41, 42, and 50; Ds' Ex. No. 25

Lot 850 - Ps' Ex. No. 44

Lot 46 - improvements & diminisions: Ps' Ex. Nos. 21, 22, 24(Photo 1), 25,
26, 27, 28, 31, 38 and 49; Ds' Ex. Nos. 26 and 52

Lot B - improvements & diminisions: Ps' Ex. Nos. 24(Photo 2) and 45

Lot 64 - improvements & diminisions: Ps' Ex. Nos. 24(Photo 2), 45 and 48;
Ds' Ex. No. 53

Lot 65 - improvements and diminisions: Ps' Ex. Nos. 17, 24(Photo 2), 34,
and 45; Ds' Ex. No. 53

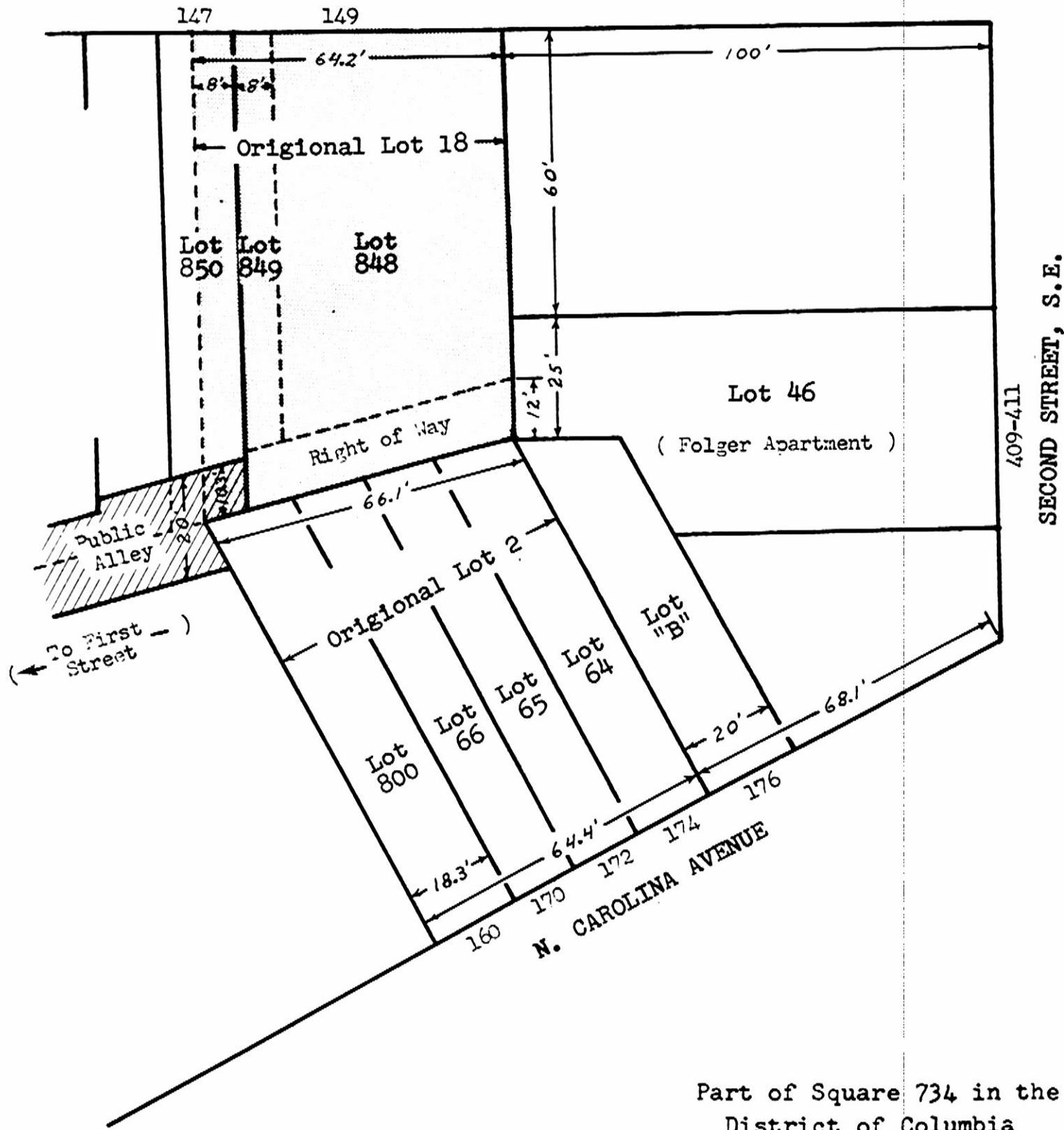
Lot 66 - improvements and diminisions: Ps' Ex. Nos. 17, 24(Photo 2), 34
and 45; Ds' Ex. No. 53

Lot 800 - improvements and diminisions: Ps' Ex. Nos. 17, 22, 24(Photo 2)
34, 45; Ds' Ex. No. 53

Right of Way - Ps' Ex. Nos. 3, 4, 15, 22, 24(Photo 9), 31, 33, 40, 42 and
45; Ds' Ex. No. 27

O U T L I N E O F S U B J E C T
P R O P E R T I E S

D. STREET, S.E.

Part of Square 734 in the
District of Columbia

Scale 1 inch = 30 feet

APPELLANTS' **REPLY** BRIEF

United States Court of Appeals

For The District of Columbia Circuit

No. 18,740

TOMMY C. ISHEE, et al.,

Appellants

v.

JULIA D. CONNOR, et al.,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

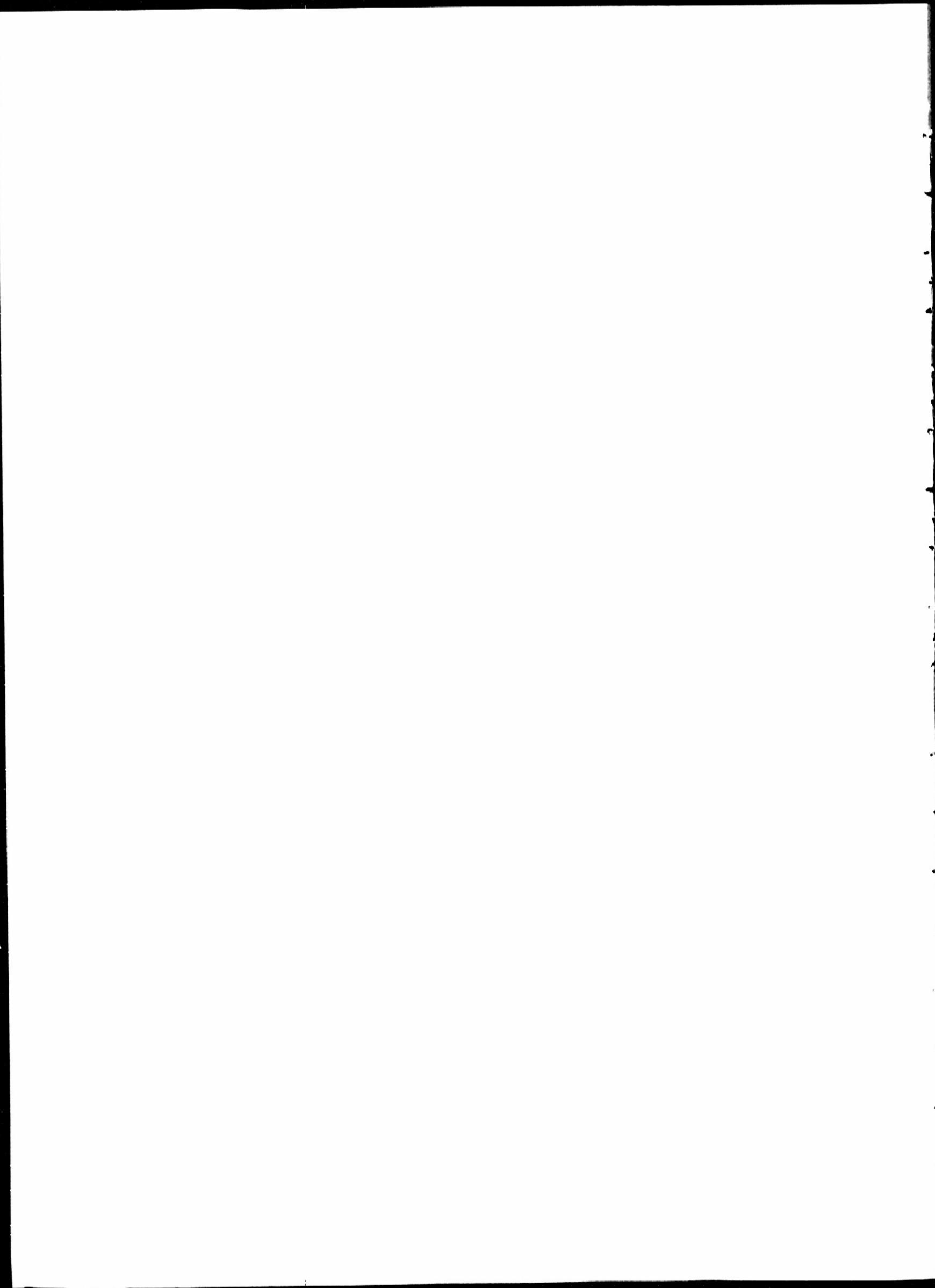
FILED FEB 5 1965

TOMMY C. ISHEE

MARYCLAIRE A. ISHEE

Appellants Pro Se

Nathan J. Paulson
CLERK



(i)

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* <i>Fowler v. Koehler</i> , 43 App. D.C. 349, Ann. Cas. 1916 E 1161	25

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* Cases chiefly relied on are marked by asterisks.

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 18,740

TOMMY C. ISHEE, et al.,
Appellants

v.

JULIA D. CONNOR, et al.,
Appellees

Appeal from the United States District Court
for the District of Columbia

REPLY BRIEF FOR APPELLANTS

**REPLY TO APPELLEES' "COUNTERSTATEMENT OF
THE CASE"**

Appellees' Brief contains a total of 43 errors of fact. Their "Counterstatement of the Case" is not a fair statement of the case but is a composite of misstatements and carefully-contrived half-truths, designed to convey the impression that appellees are successors to property owners who, honestly believing they had a right to use the rear 12 feet of appellants' land under the terms of a 1919 deed, proceeded

in 1924 to build garages at the rear of their properties and thereafter to make use of appellants' land under the terms of this 1919 grant until, in August 1962, appellants arbitrarily and without just cause barricaded the entrance to the right of way and planted trees and shrubs in the right of way area, all with the intent and purpose of denying appellees access to the rear of their properties. Nothing could be further from the truth.

It is not possible within the space limitations of this Reply Brief to reply to each of the 43 errors of fact. Appellants believe it necessary, however, to make here a summary reply to appellees' presentation of the disputed facts, in general rebuttal of the errors of fact set forth in appellees' Brief.

A. Appellants did not "barricade" the entrance to the 12-foot strip of land across the rear of their property nor plant trees and shrubs in this area at all, much less with intent to impede and obstruct appellees' use of this mutually-used area.

This 12-foot strip of land across the rear of appellants' property constitutes appellants' sole means of ingress and egress to the rear of their land. Appellants cannot enter or leave the rear of their home, on foot or by automobile, except along and across this 12-foot strip of land. All services to appellants' home - delivery of fuel and other materials, and removal of trash and garbage - are provided by way of this 12-foot strip of land. Under these circumstances alone, it is unreasonable to presume that appellants would, arbitrarily and without cause, perform any action that would obstruct or impede their own sole means of access to the rear of their home.

Moreover, appellees' allegations that, on the one hand, appellants planted trees and shrubs in the right of way area so as to obstruct passage into and along this cul-de-sac, and on the other hand, that appellants had daily parked their automobile in this same obstructed area, are self-contradictory. Both allegations were disproved by the evidence in the case, which revealed that appellees did not know (and, it would appear from their argument on pages 34-35 of their Brief, still

do not know) where the right of way they are claiming adversely actually lies on the ground and thus believed that appellants' land to the north of the claimed right of way was a part of the 12-foot strip of land.

B. In August 1962, appellants erected "gates", which could be opened and shut like doors, to delineate the boundaries of their property which, left open and unenclosed, had been subjected to nuisances and abuses since about 1958, and which is now subject to adverse claim.

Appellants did not erect "barricades" or "fences", as appellees allege, but "gates", carpenter-built, light enough to be carried by a single man, similar in design to gates commonly used across private driveways, which gates were not locked but were provided with a slip-board, operable from inside or outside the gates. While the gates were in place (August 1962 - May 1963) no service that had previously been supplied through the area was suspended; all persons who had need to pass through the gates and across the 12-foot strip of land did so.

Occupants of Lots 64, 65, 66 and 800 also had available to them as an alternate means of rear access, the 8 to 10 foot strip constituting the area of setback of the garages. Appellee Schreiber's fence on Lot 64 blocked Lots "B" and 46 from this setback area.

Under such circumstances, where no "injury" but only an "inconvenience" to appellees is shown, an allegation or finding of "irreparable injury" cannot stand, and the inconvenience to appellees, no greater for them than that imposed by appellants upon themselves, must be balanced against the injury to appellants' property and rights consequent to leaving the way open.

C. The property owners who built the garages in 1924 were not innocent and injured dominant tenements, but were participants in the fraud in the creation of the right of way in 1919.

The builders of the garages on Lots 65 and 66 were the same Margaret Connor, Partition Trustee, and Hannah Reidy, beneficiary

of the sale of the property, who had participated in the fraud in which the grantee in the 1919 deed, Marie Duff, was induced to take the property subject to the right of way on the basis of misrepresentations made in the deed that the conveyance of the land subject to the right of way was made under authorization by, and with approval of, the Supreme Court of the District of Columbia.

The fraudulent nature of the right of way clause in the 1919 deed was not discovered by Marie Duff's successors in title until research was undertaken as part of the defense of this present case.

D. The witnesses upon whose testimony appellees rely for proof of what appellees claim was adverse user, cannot reasonably be presumed to have been "intimately acquainted with all facts and circumstances respecting all of the properties which are subject to this appeal from 1924 to date", as appellees claim (Brief, p. 16).

Not one of the witnesses upon whom appellants rely for proof of adverse user in the 1924-1939 period owned any property involved in this suit during the 1924-1939 period, nor resided in any property involved in this suit for more than two years out of the total 15-year period.

Dorothy Grigsby did not even reside in the District of Columbia for 13 years of this period. While she did visit her parents at 160 North Carolina Avenue, S.E. once or twice a year, her "intimate acquaintance with all facts" is reflected by her testimony. In response to a question as to whether her father had given permission to McCray in 1924, she replied, honestly: "I wouldn't know . . . I wasn't living at home at that time" (J.A. 61). Julia and Mary Connor resided at 172 North Carolina Avenue, S.E. only for the first two years (June 1924 - June 1926) of the 15-year period (1924-1939). While they did visit their aunt at 170 North Carolina Avenue, S. E., Julia Connor testified: "On those occasions we used the front entrance and had no occasion to go out and survey the alley" (J.A. 96). Curley

Boswell, 16 years old in 1924, lived all his life two blocks away, and never owned any of the properties involved. He did visit his aunt at 160 North Carolina Avenue, S.E., and "many, many times" walked or drove up the alley. In recent years, he used the garage at 160 North Carolina Avenue, S.E. as a storage place for mantles, visiting this garage as infrequently as not once in ten months. On two occasions, separated by at least ten years, he was inside the Folger Apartment (J. A. 57, 111, 116).

Of the two witnesses whose "testimony alone" appellees claim (Brief, p. 16) establishes proof of prescriptive use during the period 1937-1952, one, Maureen Horton, did not even reside in premises 176 North Carolina Avenue, S.E. from 1939 to 1945; and the other, Dorothy Grigsby Winters, a child in 1937, testified merely to user of the roadway by occupants of adjoining properties, a fact not in dispute.

John R. Perry, rental agent for Folger Apartment owner Reed Liggit from 1957-1960 (the same period in which Appellant Tommy Ishee was sales agent for said Reed Liggit) had never discussed the matter of user of appellants' land with Liggit at all.

E. There is not a shred of evidence in the record that the fence between the Folger Apartment and appellants' Lot 848 was built, or a gate cut in this fence, or that user of appellants' land by owners of any property involved in this suit was made "without obtaining the consent at any time of any owner of said Lots 848 and 849" (as alleged in Appellees' Brief, p. 4) prior to 1945.

The testimony of appellees' witnesses in this case referred merely to user of the roadway by "everybody" (Julia Connor, J.A. 97). There is not a scrap of evidence as to whether or not the following persons ever asked or obtained permission from any owner of appellants' land: Arthur and Julia Breuninger, owners of Lot 800 until 1955; Hannah Reidy, owner of Lot 66 until 1949; Margaret Connor, owner of Lot 65 until 1950; the unknown owners of Lot 64 prior to 1961, or the owners of Lot 46 prior to October 31, 1947. Appellee Maureen Horton acquired

title to Lot "B" on August 3, 1945.

On two occasions appellants specifically did give permission for use of their land by owners and occupants of Lot 46: in 1957, when Appellant Maryclaire Ishee extended parol permission at the request of the janitor of Lot 46 (J.A. 31) and on December 6, 1960, when appellants in writing extended permission to appellee Edward Gruis (J.A. 285).

F. Appellees' statements concerning Lee Walsky are erroneous. No question about Lee Walsky's whereabouts was raised at the trial of the case.

Appellees stated in their Brief, at p. 4:

"None of the appellees who have had personal knowledge of the subject property dating back to prior to the turn of the century had either never heard of nor never met Lee Walsky. Lee Walsky did not appear as a witness in this case."

And also, at p. 35:

"Lee Walsky was not found by anyone, and did not testify, and no one else testified that Walsky participated in either the opening of the right of way or in the paving."

Lee Walsky did not testify at the trial of this case for the simple reason that he died in 1951, at an advanced age, leaving no surviving immediate kin. His will was probated in the Office of the Registrar of Wills for the District of Columbia on April 28, 1952. While living, he was a partner in a District of Columbia business firm, owner of several apartment buildings in the District, and never resided on Lot 848.

Julia Connor, who was the only witness residing in the vicinity of the roadway at the time of its opening, was also the only witness who recognized Lee Walsky's name, and knew that he owned appellants' land, having heard the name in "family discussions" at that time (J.A. 94, 95). Julia Connor thought it possible Walsky was one of the adjoining property owners who had joined in paying for the paving of the

roadway (J.A. 96).

The fact that Walsky's name was mentioned at all in "family discussions" (Julia Connor is the daughter of Margaret Connor, and niece of Hannah Reidy) at the time of the opening of the right of way, but apparently was not mentioned before or after (since the other witnesses did not recognize the name) strengthens the presumption that he did participate in the opening of the roadway. Julia Connor could not remember the names of the "other owners" who participated at the time (J.A. 96).

G. Removal of the fences surrounding Lot 848 in 1924 to permit joining the 12-foot strip of appellants' land to the 8 to 10 foot area of the garage setback, could not have taken place without Lee Walsky's consent.

The evidence in this case clearly established the fact that before the roadway was opened in 1924, the rear of appellants' land had been enclosed by fences. These fences were removed; the garages were built; the 20-22 foot wide roadway area was paved; and Lee Walsky built a new fence along the north side of the roadway, on a line with the public alley. The garages on the south side of the roadway were also on a line with the south line of the public alley.

Lots 66, 65, 64 and "B", and appellants' land, were until 1916 all part of the landholdings of Daniel Allman, Sr. They were divided into separate lots under the Partition Decree of May 31, 1916. It may be presumed that the fence which had separated appellants' land from the other properties on the south was therefore a party fence, which under District of Columbia regulations, cannot be removed except with the consent of all parties whose land it touches. The fence on the west side of Walsky's property stood wholly on his land and could not have been removed arbitrarily by anyone without Walsky's consent. Even had all parties involved believed the right of way to be a valid easement, Walsky's deed did not require him to provide an open way.

Two factors strengthen the presumption that there was a "quid pro quo" agreement between Walsky and the owners of the North Carolina Avenue properties: (1) the involvement of these property owners in the creation of the right of way itself, which would undoubtedly make them hesitate to take arbitrary action in removing the fences and running the risk of legal action; and (2) the long and peaceful user of the roadway by all, during the many years the original participants in the opening of the roadway held title to their respective properties: Walsky, until 1945; the Breuningers, until 1955; and Hannah Reidy and Margaret Connor, until 1950.

H. Appellees' statement (Brief, p. 5) that "There is no testimony whatsoever in the record of this case with regard to whether or not a right of way over the rear 12 feet of Lot 849 was considered by the District of Columbia in assessing Lot 849, excepting with respect to the assessment for the fiscal year 1964" is erroneous.

The Assessor testified as follows (J.A. 239, 240, 241):

"Q. Now, what are the records that you have there, what do you have with you? A. Well, I have a record plat of all the lots in Square 734, number, measured, areas of each, size, shape, and the assessment record cards which show the area, shape of each lot, the rate per square foot of land, and the total valuation of the property.

"Q. Is there anything on the card that indicates that there is an easement across the rear 12 feet of Lot 849? A. No, sir.

"Q. To your knowledge, do any other records in the Office of the Assessor have any indication of an easement across the rear 12 feet of Lot 849? A. Not to my knowledge.

"Q. Did you have occasion to revalue this property? A. Yes, sir.

"Q. And that revaluation was for the purpose of tax assessment? A. Yes, sir.

"Q. Realty property tax assessment? A. That is correct.

"Q. When you assessed that lot, did you take into consideration, in determining its value for tax purposes, the fact that an easement existed across the rear 12 feet of that lot? A. I wasn't aware there was an easement, so I didn't.

"Q. If you had known of the existence of an easement, would this have altered the tax rate that would have been put upon that lot?

A. The tax rate, you mean the valuation per square foot? It would have been adjusted, yes.

"Q. To your knowledge, have any of the taxes that have been assessed against Lot 849 ever been adjusted because of the easement, in prior years? A. From looking at the record that I have here, I would say no, because the rate per square foot has been the same.

"Q. I see. A. Now, the rate on the sale card when the property went to sale, which I have nothing to do with, has been the same, it is about the same amount of tax."

It is clear from the foregoing that the public records available in the Office of the Assessor (which include all records of the Recorder of Deeds, Registrar of Wills and Surveyor of the District of Columbia) did not reflect an easement across Lot 849, and that the value of an easement was never deducted from its full market value in assessing or taxing Lot 849.

SUMMARY OF REBUTTAL ARGUMENT

I. Questions 4, 5 and 6 and Arguments IV, V and VI of appellees' Brief are not relevant to the issues on appeal in this case.

II. Appellants, as successors in title to the grantee in the 1919 deed who took the property subject to the right of way in reliance upon the truth of misrepresentations made in the deed, are not estopped, either as to Lots 848 or 849, from challenging the validity of the easement, even though they acknowledged the existence of the easement by written instrument. The misrepresentations constituted a fraud, which renders the easement voidable.

III. In the District of Columbia, intent to claim adversely must be "manifest" in order to be adverse, and to constitute a prescription, must be either "exclusive" or manifestly "hostile". A prescription cannot vest where user is neither "exclusive" nor "hostile".

IV. A claimed prescriptive period must be delineated with exactness; a generalization such as from this year to that year is not sufficient.

V. The Supreme Court rule that when fraud is alleged as grounds to set aside a title, the prescriptive period does not begin to run until the fraud is discovered, applies also to easements. The Trial Court was in error in declaring the question of validity of the right of way moot.

VI. The decision of this Court in Bonds, et al. v. Smith does not conflict with its decision in Umhau v. Bazzuro. Whether or not "privity" exists between landlord and tenant to enable landlord to tack his tenant's trespass to his own to complete a prescriptive claim depends on whether or not the contract (lease) between them was such that an action for the trespass of his tenant would have lain against the landlord.

VII. The Supreme Court has held that the running of a prescription is interrupted by a sale for taxes for the reason that under Virginia law, property became forfeit to the State upon an owner's failure to pay properly assessed taxes. Under District of Columbia statutes, a property becomes forfeit to the District of Columbia when an owner fails to redeem a property sold at tax sale within the statutory redemption period, whereupon the District of Columbia takes title to the property in public trust, for resale. The running of a prescriptive claim is therefore interrupted upon the expiration of a statutory redemption period after tax sale, and cannot run while the District holds title to the property.

VIII. Where injury is negligible, a finding of irreparable injury is not justified. In this case, appellees' injuries were so negligible that they withdrew their claim for damages at the trial of the case.

IX. The normal presumption that enclosure by a fence for a prescriptive period constitutes adverse possession is rebutted by evidence of the existence of a tree along the true boundary line; friendship between the families of owners of the adjoining properties; the fact that the fence "jutted out" from the true boundary line was clearly visible;

and no evidence that any claim to other than the true line was ever made.

X. Adverse possession of a party fence is per se impossible. The fence is used by both parties. A finding that a party fence and the land thereunder was adversely possessed is contrary to District of Columbia law, which holds erection of a party wall not a taking of property for private use, but only creation of a mutual easement, and District of Columbia statute, which declares that if a wall of any house already erected cover 7 inches or more of adjoining land, it shall be deemed a party wall.

REBUTTAL ARGUMENT I

Questions 4, 5 and 6 and Arguments IV, V and VI of Appellees' Brief Are Not Relevant to Issues On Appeal In This Case

Questions No. 4, 5 and 6 and Arguments IV, V and VI, as set forth in Appellees' Brief, are totally irrelevant to the issues involved in this appeal and, appellants respectfully submit, should be disregarded by the Court in its consideration of this appeal.

Appellants do not claim in this appeal, and have never claimed in this case, that user by appellees of appellants' land was, if prescriptive at all, an "easement in gross" and not an "easement appurtenant."

Appellants do not claim in this appeal, and have never claimed in this case, that a tax deed extinguishes an easement appurtenant (whether created by prescription or by grant) if the value of said easement was deducted from the assessed and taxed value of the servient estate.

Appellants do not claim in this appeal, and have never claimed in this case, that "fee simple title" vests in the District of Columbia when it bids in a property sold for unpaid taxes at tax sale.

REBUTTAL ARGUMENT II

Estoppel Does Not Set Up Against Successors To Grantees Who Took Property Subject To Easement Because Said Grantees and Successors Acknowledged Easement By Written Instruments Before Fraud Was Discovered

Appellees attempt to argue that because appellants acknowledged the right of way clause in the deed by which they took title to their Lot 848, and subsequent deeds of trust (the tax deed to Lot 849 does not contain a right of way clause) they are therefore estopped from denying the validity of the right of way. Appellees' argument is a marvelous inversion of the concept of estoppel, of which Bigelow says, (Estoppel, 6th Ed. 1913, pp. 636, 637):

"An estoppel arises only through reliance upon a misrepresentation of a present or past factual situation. The person estopped must have caused, in such a way that he is responsible for having done so, the person claiming the benefit of an estoppel to believe something to be true which is not true."
(Emphasis added).

Appellants herein are successors to the grantee in the 1919 deed, who took the property subject to the right of way in 1919 on the basis of false representations made in the deed that the right of way, as an easement appurtenant, had been approved by the Supreme Court of the District of Columbia.

Clark, in Handbook of the Law of Contracts, p. 290, summarizes "Hornbook Law" on fraud and contracts for the sale of land as follows:

"Under the rule now applying to contracts generally, contracts for the sale of land are treated as voidable for material innocent misrepresentations both in England and in America. Thus, it has been held that a misdescription of the land, or of the title, or of the terms to which it is subject, though made without any fraudulent intention, will avoid the contract."

This concept has been extended to easements created by written instrument. In City of Elizabeth v. Caswell, 261 S.W. (2) 424 (Ky. 1953) the Court held that the landowner was not bound by a written conveyance of an easement where false representations had been

made by city officials.

Since Lot 849 was part of the land conveyed subject to the 1919 right of way clause, the same considerations apply to Lot 849, as to Lot 848. Appellants are present legal owners of Lot 849, and their past user, which did not constitute a prescription for them any more than it did for appellees over land owned not by Gray Properties, Inc., as appellees claim, but by the District of Columbia, is immaterial. Appellants are not estopped from denying the validity of the easement over either Lots 848 or 849.

REBUTTAL ARGUMENT III

Where Claimed Adverse User Is Not Exclusive, Manifest Hostile Claim Must Be Proved; Mere User, When Not Exclusive, Does Not Justify Presumption That User Is Adverse

Appellants respectfully submit that this Court's ruling, in Kogod et al. v. Cogito, 91 U.S. App. D.C. 284, 200 F. 2d. 743 (1952) that "open and continuous use of another's land is commonly presumed to be adverse in the absence of evidence to the contrary", is not applicable to the case at bar, as appellees claim.

Richard R. Powell, one of the authors of the Restatement of the Law on Property, which appellees quote in support of their argument, states in Powell on Real Property, Part III, Sec. 413, p. 442:

"Proof that a particular use of another's land has, in fact, occurred, normally justifies ... a finding that the use has been adverse until the presumption is challenged by rebutting evidence. When, however, rebutting evidence has been produced, the burden of establishing the fact of adversity rests on the claimant.

"In three special situations this presumption of adversity is inapplicable ... where the landowner and claimant have such a relationship to each other that the landowner is reasonably entitled to regard the user as permissive unless specifically informed of the contrary fact, as, for example ... when a prior license of the use is being repudiated ...

"When the land over which the easement is claimed is open, unenclosed and unimproved ...

"When the established user by the claimant is not exclusive, that is, does not rest upon an independent foundation. If the claimant is only one of two, or several, or many, who make the user in question, it is perhaps inferrable that all of these uses are permissive. In such a case, the claimant must affirmatively prove the adverse character of his behavior. All three of the above described situations contain abnormalities which justify an elimination of the presumption that long continued use is 'adverse use'."

(Emphasis added)

Elements of all three of the above-described "abnormal situations" which "justify an elimination of the presumption that long-continued use is 'adverse use'" exist in the present case. The 12-foot wide strip of land constituting the claimed right of way was open and unenclosed on two sides for 29 years; on three sides for an additional ten years, so that the adverse claimants did not know where it actually lay on the ground. User by tenants of the Folger Apartment prior to October 31, 1947 constituted a license by owners of appellants' land. There is no question whatsoever concerning the non-exclusiveness of the user in this case. The testimony is virtually unanimous that occupants of all adjoining properties and the general public used the roadway; that "Everybody used the alley ... It seemed to be open to everybody" (Julia Connor, J.A. 94, 99), and that it was "used publicly" (Lydia Meaders, J.A. 70).

There is likewise no evidence in this case that any owner of any property involved ever "specifically informed" any owner of appellants' land that an adverse claim was being made, or, except in the sole instance of the transfer of services to the rear of the Folger Apartment after October 31, 1947, indicated in any manner whatsoever that they were claiming, or using, as a matter of right.

Appellees' argument that neither "exclusive" nor "hostile" user is an essential element in a prescription in the District of Columbia is a masterpiece of semantic gymnastics and logical legerdemain. As proof of their contention that "hostile" use is not an essential element, they cite three cases, all involving adverse possession and not user, all involving an exclusive use so blatant no landowner could

reasonably be presumed not to have known it was being made under a claim of right, even though the trespasser was, in fact, trespassing by mistake.¹

Having thus, they believed, neatly disposed of the element of "hostile" user, they take out of context a summary definition from the Restatement of the Law of Property, a statement which defines not the elements necessary to constitute adverse user, but merely lists adverse user as one of the factors involved in the creation of an easement by prescription, a statement of which one of its authors wrote:

"Adopting this as a succinct formulation of the law, it becomes necessary to develop the detailed meaning of three parts of this sentence, namely, (a) 'adverse use'; (b) 'continuous, uninterrupted'; and (c) 'the period of prescription'.

"Adverse use is a complex concept requiring consideration of (a) the person as to whom such use is adverse; and (b) the prerequisites which must be satisfied before a use is entitled to be called adverse"

(Powell on Real Property, Part III, Sec. 413, p. 442)

Appellees argue that the lack of specific mention of the word "exclusive" in the Restatement definition therefore shows that "exclusive" user is not necessary in adverse possession or prescription.

Powell, discussing the difference between the acquisition of an estate in fee simple absolute, by adverse possession, and rights in the land of another, by prescription, states (Powell on Real Property, Vol. 6, Sec. 1026, p. 759):

"The conduct required under the two terms is generally identical, except that (a) the nature of the interest claimed under a prescription dispenses with the necessity for an 'exclusive' use; the theory of a lost grant is more often followed in prescription

¹ In McMillan v. Fuller, 41 App. D.C., the adverse claimant not only trespassed on the land, but fenced it, built a house on it, and occupied the house for 20 years. In Johnson v. Thomas, 23 App. D.C. 1941, 150, within the limited confines of the District of Columbia, the adverse claimant occupied for 20 years, to the exclusion of the true owner, an area amounting to three full city blocks. A similar situation obtained in the case of Rudolph v. Peters, 35 App. D.C. 438, 447, Ann. Cas. 1912, A. 446.

cases than it is in adverse possession cases; and (c) in prescription, the scope of the acquired interest is more closely tied to the details of the hostile conduct than it is in adverse possession."

(Emphasis added)

The "law of the land" with respect to adverse possession, and adverse user, which is merely an extension of adverse possession, has been set since 1893, when the U.S. Supreme Court, in Ward v. Cochran, 150 U.S. 597, stated:

"Five elements should concur to create an estate by adverse possession, namely that it should be actual, exclusive, open and notorious, hostile to the true owner and continuous for 20 years."

(Emphasis added)

In Ward v. Cochran, supra, the Supreme Court substituted the word "hostile" for the term "adverse" it had used in an earlier (1871) decision in Armstrong v. Morrell, 81 U.S. 120, 14 Wall 120, 20 L. Ed. 765, when it held:

"Adverse possession, to bar recovery in ejectment, must be continuous and uninterrupted, as well as open, notorious, actual, exclusive and adverse."

District of Columbia Courts have followed the Supreme Court ruling, from Doswell v. de la Lanzo, 20 How. 29, 15 L. Ed. 824, where the Court stated:

"Possession to be effectual, either to prevent a recovery, or vest a right under the statute of limitations, must be actual possession, attended with a manifest intention to hold and continue it,"

(Emphasis added)

to the statement of this Court, in Umhau v. Bazzuro, 133 F. (2) 256 App. D.C. 1942:

"Effective user, to establish a prescription, must be open, notorious, exclusive, continuous and adverse."

From the foregoing it is clear that "manifest intent" to claim either possession or user as a matter of right is essential both in adverse possession and prescription; that such "manifest intent" must be specifically expressed as a "hostile" claim where an adverse claimant is not the sole occupant or user; that where neither

"exclusive" nor "hostile" user is found, no prescription can exist. The Trial Court was therefore in error, and its judgment should be reversed.

REBUTTAL ARGUMENT IV

A Claimed Prescriptive Period Must Be Delineated With Exactness

Appellees claim three alternate periods of prescription, one of which runs from 1937 to 1952. Appellants respectfully submit that "sometime" in 1937 to "sometime" in 1952 cannot constitute a period of prescription. As is pointed out in the Restatement of the Law of Property (Vol. 5, p. 2951), "Until the last moment of the prescriptive period, the acts of the adverse user are generating new causes of action." This "last moment" must therefore be specifically designated.

REBUTTAL ARGUMENT V

When Fraud Is Alleged As Grounds For Voiding An Easement, the Prescriptive Period Does Not Begin To Run Until the Fraud Is Discovered

The validity of the easement incorporated in the 1919 deed was challenged by appellants during the trial of this case, on the grounds that the Partition Trustees had no authority to convey the property subject to an easement appurtenant, although they stated that the deed was given, and the conveyance made, "by virtue of" two orders of the Supreme Court of the District of Columbia, dated May 31, 1916 and January 7, 1919 (J.A. 248). The grantee, Marie Duff, took the property subject to the easement in reliance upon the truth of the statements made in the deed. The fact that they were in fact untrue, and constituted a misrepresentation of the true facts was not discovered by Marie Duff's successors in title until after commencement of the present case.

The United States Supreme Court held, in Moore v. Greene, 60 U.S. 69, 19 How. 69, 15 L. Ed. 533 that:

"Where fraud is alleged as a ground to set aside a title, the statute of limitations does not begin to run until the fraud is discovered."

The Trial Court in the case at bar was therefore in error, not only in finding that a prescription had run for any of the appellees who had claimed to be dominant tenements under the 1919 deed - Lots 800, 66, 65, 64 and "B" - but in declaring the question of the validity of the right of way to be moot because a prescription had been found.

REBUTTAL ARGUMENT VI

Nature of the Landlord-Tenant Contract Is the Determining Factor as to Whether Privity Exists for Tacking Purposes in Adverse Possession or Prescription

The holding of this Court in Bonds et al. v. Smith, 79 U.S. App. D.C. 118, 143 F. 2d. 369 (1944) affirmed, rather than reversed, its earlier decision in Umhau v. Bazzuro, supra. In Bonds et al. v. Smith, supra, this Court declared: "Generally, the privity which is necessary to permit tacking may be of estate, blood or contract." In Umhau v. Bazzuro, supra, this Court reached its decision that the landlord could not tack his tenants' user so as to complete a period of prescription for the reason that no contract (lease) had been produced to show that "the right of way was mentioned or included in any of the appellants' leases", nor "that any representations were made to any of the tenants relative thereto, nor is there any other writing which would indicate that the user was made under the color of the lease." The Court stated:

"It cannot be said, under these circumstances, that the use of the tenants inured to the benefit of the appellants. In order to ripen into title the adverse user must be of such character that an action for trespass might be maintained therefor. Here no action lay against the appellants for the trespasses of their tenants. Any adverse user that may have been made would benefit only the particular tenant. There was no privity of estate between the successive tenants."

In the case at bar, as is set forth at length in appellants' Brief, (p. 43), the record showed no evidence to indicate that any action in trespass would have lain against the landlord of the Folger Apartment prior to October 31, 1947, for any of the individual trespasses of his tenants. The landlord, Appellee Gruis herein, therefore cannot tack user of his tenants prior to October 31, 1947 so as to constitute a period of prescription.

REBUTTAL ARGUMENT VII

The Running of a Prescription Is Stopped By Forfeiture of a Property to the District of Columbia upon the Property Owner's Failure to Redeem the Property within the Statutory Redemption Period

The Supreme Court of the United States set the law that the "running of a prescription in favor of one holding by adverse possession is interrupted by a sale for taxes" almost a hundred years ago, in Armstrong v. Morrell, 81 U.S. 120, 14 Wall 120, 20 L. Ed. 765 (1871), affirming Morrell v. Armstrong, Fed. Cas. No. 9,822, 4 Am. Law Rev. 194. In that case, Supreme Court Justice Clifford stated:

"The evidence showed that the land, on the 1st day of November, 1836, became forfeited to the State, as a matter of law, by the failure of the owners to enter the same upon the books of the Commissioners of Revenue of the proper county, and pay the taxes properly charged thereon ... The adverse possession acquired by the defendants before the 1st day of November, 1836, cannot be connected with the adverse possession acquired by them after the grantors of the plaintiff became vested with the title of the State, under the before-mentioned act of the Assembly passed for their relief

"Argument to show that the statute of limitations ceased to run when the forfeiture attached and the title became vested in the State can hardly be necessary, as the rule that time does not run against the State has been settled for centuries and is supported by all Courts in all civilized countries

"Beyond all question the case of Hall v. Gittings [2 id. 1127] presented the same question as that involved in the case before the Court, and the decision was that forfeiture to the State within the period necessary to give effect to the Statute did have the effect to break the continuity of the adverse possession and prevented the operation of the Statute bar."

The only question involved in the case at bar is, therefore, whether, under District of Columbia statutes, a property becomes forfeit to the District of Columbia upon an owner's failure to pay properly assessed taxes, and his failure to redeem his property within the redemption period provided by statute.

McQuillan, in Municipal Corporations, Vol. 16, citing State v. Stacy, 10 Wash. 2d. 248, 116 P. (2d.) 356, declares:

"When a city or town acquires title to property ... through foreclosure of delinquent ... assessments ... the city holds title to the land in trust for the purpose of realizing funds on resale of such land in order to pay the obligations for which the land has been subjected to ... assessments"

(Emphasis added)

The intent of the Congress that title to a property upon which the owner has failed to pay the taxes - the "public burdens imposed generally by the inhabitants of the whole state ... for governmental purposes" as Black (Law Dictionary) puts it - be forfeit to the said "inhabitants of the whole state" through their representative, the District of Columbia government, for resale purposes, and that no revenue be lost in the process, is clear from the language of the statutes.

The statutes spell out in detail every action that must be taken in the taxing process, from the assessment of the property up to the issuance of a tax deed to the holder of a tax certificate. In every instance the statutes specify that the District, through a specified officer thereof, "shall" perform the named action. Once the two-year redemption period has expired upon a property bid in at tax sale in the name of the District, however, disposition or resale of the property is at the discretion of the District of Columbia, through the Commissioners. These Commissioners, the statute states (Title 47, Sec. 47-1011 of the D. C. Code) thereafter "may, in the name of the District aforesaid" sell the property at public or private sale, but only, as with any trustee for sale, with the sanction of the Court, in this case the District Court for the District of Columbia, sitting in equity. Such language in any private conveyance could not fail

to be construed as a trust, with the Commissioners serving as trustees, with legal title to the property vested in them, for resale.

It is respectfully submitted that the forfeiture of title by the owner, and the vesting of trustees' title, for resale of the property, in the District, comes within the Supreme Court decision in Armstrong v. Morrell, supra, and that in the District of Columbia, "the running of a prescription in favor of one holding by adverse possession /or one claiming by adverse user" is interrupted by a sale for taxes" upon the expiration of the statutory redemption period.

As to appellees' arguments, (1) that the law requires that the property be assessed in the name of the owner - the same statute permits it to be assessed in the name of a deceased owner until the property is divided, or has passed into the hands of another person; (2) that taxes continue to be assessed against a property bid in by the District - if trustees' title to the property did not vest in the District, this specific statute would be unnecessary to guard against loss of revenue; and (3) the title report of the Realty Title Insurance Company, Inc. (J.A. 278) which states that title to Lot 849 was vested in Lee Walsky as of December 31, 1941, also shows that a tax deed was issued eleven years earlier to Jennie Faust (on May 3, 1930) which deed expunged, according to the ruling of this Court in W. C. & A. N. Miller Development Co. v. Emig Properties Corp., 77 U.S. App D.C. 205, 1943, "all interests" which originated "in record title" and vested "in the holder /Jennie Faust" a new and complete title to the property in fee simple."

REBUTTAL ARGUMENT VIII

A Finding of Irreparable Injury Is Not Justified Where the Injury Is Negligible

Appellees cite "Hornbook Law" that where damages cannot fully compensate an owner, the injury is irreparable. Powell (Powell on Real Property, Vol. 3, Chap. 34, Sec. 420) adds:

"Such a conclusion is not justified where the damage caused is easily compensable, or where the injury is negligible, or where the obstruction had ended prior to the suit."
(Emphasis added)

In the present case, appellees' injuries were so negligible that they withdrew their \$25,000 claim for damages at the trial of the case.

REBUTTAL ARGUMENT IX

Rebutting Evidence Eliminates Justification of Normal Presumption That Enclosure Proves Adverse Possession

While enclosure of land by a fence for a prescriptive period normally justifies a presumption of adverse possession, appellants submit that the following facts constitute rebutting evidence to this presumption:

1. The location of the old tree along the true boundary line, with its gnarled roots protruding above the ground on the true boundary line, represented by an extension of the fence (which is a party fence, 2 inches of which lies on Lot 848) just north of the tree stump in the photograph (D's Ex. No. 14).
2. The fact that the fence between Lots 848 and Lot 46 (the Folger Apartment) "jutted out" beyond the tree and beyond the line of the party fence between Lots 848 and Lot 30, which "jut" in the fence was clearly visible (J.A. 174).
3. The fact that Daniel Allman, Sr., owner of Lot 848 from 1899 to 1915 was residing at 170 North Carolina Avenue, S.E., less than 50 feet from where the fence stood.
4. The fact that the record contains utterly no evidence of unfriendliness between William McCray, owner of Lot 46 and presumed builder of the fence in 1905, and Daniel Allman, Sr., owner of Lot 848.
5. The fact that there was a lifelong friendship between certain members of the McCray and Allman families, and lifelong friendly, neighborly relations among other members.

6. The fact that the record contains absolutely no evidence that any owner of Lot 46 prior to commencement of this suit (when the claim was made as a defense to this suit) ever gave any indication of any claim to other than the true boundary line of his property.

Under the circumstances of the case, it is not reasonable to presume that Daniel Allman, Sr., who had owned his land several years before McCray acquired Lot 46, would stand at the rear door of his home and watch a stranger, arbitrarily and without cause, build a fence that wrongfully and visibly enclosed a foot of Allman's land.

It is more reasonable to presume that the two men came to an agreement, with Allman permitting McCray to use his land (a use that entailed approximately a foot at the point where the tree stood, and less than that as the fence ran southward toward Lot "B") so that Allman's property could continue to enjoy the shade of the elm tree, which was at least 15 years old in 1905.

In Neale v. Lee, 8 Mackey 5, 19 D.C. 5, it was held that, where a house was mistakenly built 6 inches over on a neighboring lot, with both parties supposing that the line between them was correctly located, and the mistake was not discovered for the prescriptive period, the possession of the 6 inches of land was adverse, since the erroneous line had been asserted as the true line, and not a case where the true boundary line was admitted but mistakenly located.

Appellants submit that the present case represents the converse of this situation, being a case where the true boundary line was admitted, but the enclosing fence was located beyond it as a convenience to both parties. In such case, the possession is not adverse, and the Trial Court was in error in so finding.

REBUTTAL ARGUMENT X

Adverse Possession of a Party Fence Is Per Se Impossible, and a Finding That a Party Fence and the Land Thereunder Was Adversely Possessed Is Contrary to District of Columbia Law

A party, or partition fence simultaneously encloses and excludes adjacent properties, one from the other. Exclusive use or benefit or possession of the fence and the land lying under the fence cannot be claimed by either neighbor. The obligation of owners of partition fences each to maintain a just portion of the partition fence is rooted deep in common law.

There is no question but that the fence in question, when built, stood wholly on Lot 848, and therefore could not be removed by anyone but the owners of Lot 848. If, as appellees claim, after the fence was built in 1905 McCray immediately entered a claim by adverse possession to the one foot (more or less) of land enclosed by the fence, so that his prescriptive claim matured in 1920, the fence itself, and the land thereunder, became no more than a party fence, standing half on the land adversely possessed by Lot 46 and half still on Lot 848. Under District of Columbia Building Regulations, application to build a party fence must be signed by owners of the land on whose land the fence will stand. A party fence cannot be removed except with the consent of both owners.

It was held by this Court, in Fowler v. Koehler, 43 App. D.C. 349, Ann. Cas. 1916 E, 1161:

"The erection of a party wall by one of two adjoining owners does not amount to a taking of property for private use, but amounts only to the establishment of a mutual easement or servitude."

Title I, Sec. 625 of the District of Columbia Code provides:

"If the wall of any house already erected cover 7 inches or more in width of the adjoining lot, it shall be deemed a party wall, according to the regulations for building in the District, and the ground so occupied more than 7 inches in width shall be paid for as provided in Sec. I-625."

(Act of March 3, 1901, Stat. 1426, Ch. 754, Sec. 1587)

For the foregoing reasons, it is clear that the Trial Court was in error in finding that title by adverse possession to a one-foot strip of Lot 848, and to the fence and the land thereunder, had vested in the owner of Lot 46, and in dismissing appellants' counterclaim for damages against Appellee Gruis for his arbitrary removal of the fence without their consent.

For all of the reasons set forth in this Reply Brief, and in Appellants' Brief, it is respectfully submitted that the order of the District Court should be remanded with directions to enter summary judgment for appellants.

Respectfully,

TOMMY C. ISHEE
Appellant Pro Se

MARYCLAIRE A. ISHEE
Appellant Pro Se

January 1965